THE LAW REPORTER.

AUGUST, 1843.

THE HON. JOHN HOLMES.

The Hon. John Holmes died at Portland, in the state of Maine, July 7, 1843, in the seventy-first year of his age. This gentleman, from long practice at the bar, and the space he has occupied in public attention, is entitled from us to more than a passing notice. He was one of the oldest practitioners in the state, and died at his post. He was also a veteran politician, and was longer and more busily occupied on the field of party warfare, than any of his contempories, who have survived him. We therefore seize the earliest opportunity to pay a brief tribute to his services and character.

Mr. Holmes was the second son of Malachiah Holmes, and was born at Kingston, Massachusetts, in March, 1773. His early life was passed as a manufacturer in the extensive iron works of his father, at that place. He was seen toiling at the furnace by a collegian, the temporary schoolmaster of the village, who, being attracted by his intelligence, advised his father to educate him. The hint was improved, and in December, 1792, at the age of nearly twenty, he took his first lessons in Cheever's Latin Accidence, at the town school. His friend, on leaving the school in the spring, commended young Holmes, who had made very rapid progress in his studies, to the instruction of the Rev. Zephaniah Willis, the venerable minister of Kingston. He was admitted at Brown University one year in advance, in 1793, where he pursued his studies with great assiduity, and was a good scholar, although he labored under serious disadvantage, for want of early training; he

enjoyed the friendship of his college companions by his good humor, his frank and amiable manners. The same fearlessness, the same easy and independent manner characterized him there, as in the subsequent periods of his life. Among his classmates, were Tristram Burgess, of Rhode Island; Mr. Chief Justice Aldrich, of Vermont, Dr. Benjamin Shurtleff, of Boston, and Dr. Benjamin O. Simmons, of South Carolina.[1] He was graduated with a respectable appointment in 1796, and immediately entered upon his professional studies with Benjamin Whitman, who then resided at Hanover, and was in full and distinguished practice in the Old Colony. He was a diligent student in this situation, and fully bent on success in his profession.

On being admitted to the bar, in 1799, he resolved to seek his fortune in the eastern country, a remote and comparatively unknown region, but affording to the enterprising and intelligent adventurer, an eminent promise of success, and an ample field of professional labor. He established himself in September, 1799, at Alfred, in the county of York, in Maine, then a district of the town of Sandford, and containing but about eight hundred and fifty inhabitants. It was not incorporated until 1808; still it afforded a very favorable opportunity for a talented young man to rise in the profession. He was for several years the only lawyer in the neighborhood. The titles to land in that part of the county were in an imperfect and unsettled state; the settlers had made their *pitches* upon vacant spots, in what was called the *Fluellen* or *Phillips* grant, and made their improvements without a shadow of title; the proprietors had just begun to make an investigation of their rights. Mr. Holmes was employed by them for this purpose, and pursued the inquiry and the prosecution of the claims with great industry and success.[2] Many actions were necessarily brought,

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[1] The Rev. Jonathan Maxcy, a ripe scholar, had just been inaugurated president of this college, at the very early age of twenty-four years.

[2] Lieutenant William Phillips, son of William Phillips, of Boston, moved to Saco, in 1660. He was a *land speculator*, fully equal to any in modern times. In 1661, he purchased of the Indian Sagamore, Fluellen, a tract of land about eight miles square, including what are now the towns of Sandford, Alfred, and Waterborough. He also purchased in 1664 a large tract extending up the Saco river, fifteen miles above the falls at Saco. He had uncontrolled influence in the affairs of the settlements on the river. He returned to Boston in 1676, on account of the Indian war which had just broken out, and the same year conveyed the Fluellen tract to two of his sons, and several other of his connections, one of whom was Sandford, the son of his wife by a former husband, who had been secretary of Rhode Island. The tract was first called Philipstown, afterwards Sandford, from the son above mentioned.

and much and exasperated litigation was the consequence, which called forth great legal talent from Maine and Massachusetts, and settled some very important questions in the law of real estate. The statement of one of these cases, in which Mr. Dane of Beverly appeared as counsel, may be found in 7 Dane's Abridgment, 697. The discussion of the points in this case produced some little excitement between Mr. Chief Justice Parsons and the counsel, particularly with Mr. Dane, toward whom the judge expressed himself with some impatience, in regard to the plea of *not guilty* to a writ of right. These cases brought Mr. Holmes into extensive practice, and a familiar acquaintance with the law of real estate; and his fees were not inconsiderable. The counsel upon the other side complained to him that he received all the emoluments, while they had to bear heavy burdens.[1]

The courts in York, beside their own lawyers were attended by the late Mr. Chief Justice Parker, Mr. Symmes, and Solicitor Davis of Portland, some New Hampshire lawyers, and occasionally by professional gentlemen from Massachusetts, and were made the occasion of a great deal of sport and hilarity.[2] This collection of lawyers, jurors, suitors, and witnesses, filled up the small villages in which the courts were held, and the public houses could not afford comfortable accommodation for the persons that thronged them. It was quite a privilege, enjoyed by few, to obtain a separate bed, far more a separate chamber. These meetings were the occasion of much dissipation, in which many members of the bar were no ascetics. Scenes of frolic and waggery are still remembered

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[1] At the time Mr. Holmes commenced practice, the supreme court was composed of Mr. Chief Justice Dana, and Justices Paine, Bradbury, Nathan Cushing, and Dawes, and was held at York once a year. The common pleas consisted of Nathaniel Wells, Edward Cutts, Jonas Clark, and Simon Frye, none of whom were educated as lawyers. There were three terms a year of this court, held at York, Waterborough, and Biddeford.

[2] The judges and the lawyers, on account of the badness of the roads, generally performed their circuits on horseback, and often met with poor fare and rough usage; but when they could not get a good dinner, they would contrive to have a good laugh, to which Judge Paine, Mr. Davis, and the late Judge George Thacher, contributed no little of the attic seasoning; although it must be confessed that the jokes were often more practical than refined. The mail was also transported on horseback. It is related that a respectable lawyer on one occasion, as he was passing through Saco woods, met the mail-carrier, and expecting a letter from home by the mail, which only came once or twice a week, he expressed to the post-rider, his desire to obtain the letter. He took off his mail bag without hesitation, poured the contents upon the ground, and they both went to work searching for the desired object. The letter having been found, the carrier quietly deposited the remaining budget in his bag, and pursued his way.

which would shock the gravity and sobriety of the present generation. The gravity and dignity of the bar in that day of the robe and the wig, were very apt to be left in the court room — they were seldom seen in the bar room. Mr. Holmes contributed his share to the amusement of his associates. At one time he officiated as the priest in a mock marriage of one of the bar with a lively girl of the village, in which the parties jumped over the broomstick. The affair was reported by a wag to Judge Cutts, a feeble member of the judiciary, as involving his friend, Mr. Holmes, in a serious dilemma, for having performed a ceremony for which he was not legally qualified. The judge was only relieved from the pain this intelligence gave him, by the assurance of Judge Wells that the whole matter was a joke.

The number of lawyers in Maine, at the time of Mr. Holmes accession to the bar was forty-three, of whom nine resided in the county of York, which then included Oxford, and was the most populous county in the district.[1] Those in York, were the late Mr. Chief Justice Mellen in Biddeford, Cyrus King in Saco, Dudley Hubbard, Temple Hovey, and Edward P. Hayman in Berwick, Joseph Thomas and George W. Wallingford in Kennebunk, Judah Dana in Fryburg, and Nicholas Emery in Parsonsfield. Beside these, the bar of Maine then contained the rich names of Mr. Chief Justice Parker, Mr. Justice Wilde, and Solicitor General Davis, afterwards of Massachusetts, Mr. Chief Justice Whitman, then of New Gloucester, William Symmes, and Salmon Chase of Portland, and Silas Lee of Wiscasset, who was afterwards a member of congress, and fourteen years United States Attorney for Maine. These all were distinguished in their profession, and most of them in public life. Of the forty-three, but eight are now living, viz., Mr. Chief Justice Whitman, Judge Wilde, Judge Dana, Judge Emery, Benjamin Hasey of Topsham, Judge Bailey of Wiscasset, and Allen Gilman of Bangor. Mr. Holmes, although senior in years to several of these, was the youngest at the bar.

Mr. Holmes was a good lawyer, but not of the first order. He handled the weapons of wit with more skill and effect than those of a severe logic, although he was not deficient in that prime quality of a sound jurist. The force of his argument was sometimes weakened or at least appeared to be less close and stringent, by the propensity he had, and which he seemed not able to control, of

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[1] The population of York county was then 34,000, of Maine, 151,000.

mingling in its texture the gay threads of wit and anecdote. He was quick of perception, and seized readily upon a weak point of his adversary, which by a great facility of language and infinite good humor, he turned to the best account. Whenever an opportunity occurred of exhibiting his opponent in a ridiculous position, no person could better avail himself of the occasion. An opportunity of this kind was furnished him in the discussion which took place in the senate of the United States, on some subject connected with nullification. Mr. Tyler, we believe, alluding to the satirical remark of John Randolph, some years previous, which designated certain active politicians as partners, under the name of "James Madison, Felix Grundy, John Holmes and the Devil," inquired, with a view to reproach Mr. Holmes, what had become of that celebrated firm. Mr. Holmes immediately sprung upon his feet, and said, "Mr. Speaker, I will tell the gentleman what has become of that firm; the first member is dead, the second has gone into retirement, and the last has gone over to the Nullifiers, and is now electioneering among the gentleman's constituents! and thus the partnership is legally dissolved." The laugh produced on the occasion was wholly at the expense of Mr. Tyler.

In his discussions at the bar, Mr. Holmes often carried the exercise of this talent too far for good taste or ultimate benefit to his client; to raise a laugh at the expense of an opponent, is not always to gain a cause; he was yet very successful with the jury and a popular advocate, and became and continued for several years the leader of the York bar. Wit and humor were the characteristics of his mind; they efflloresced on all occasions, at the bar, in the legislature and in private life, and he delighted in their display. An instance or two, at random, will exhibit this trait more perfectly. He was once assisting a client in the survey of a parcel of land about which he was quarrelling with his neighbor; neither of the parties was of unimpeachable character. As they were passing through a portion of the disputed territory, they came to a swamp covered with bushes and almost impassable; one of the litigants said to Mr. Holmes, "this, 'Squire, is the Devil's hop-yard." "Ah!" said Mr. Holmes, "then I think the Devil must be dead, for I see his sons are quarrelling for the *inheritance*." "Then you expect to prevail," said the opposing counsel, "as your client is the oldest heir." "It is not certain," said he, "my client, to be sure, is the *oldest*, but yours is the most *deserving*."[1]

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[1] Mr. Holmes was equally happy in the relation of anecdotes. The Rev. Mr. P., some years since, delivered a lecture at Alfred on the subject of *slavery*, and took

During a portion of the time of Mr. Holmes's practice, Joseph Bartlett also practised at that bar. He was a graduate of Harvard, of the class of 1782, and settled first in Woburn, Mass.: he came to Saco in 1802. In some respects he resembled Mr. Holmes; he was a better scholar, and of a more polished wit: his manners were insinuating, and he possessed a peculiar sway over the minds of young men. In other respects he was far different from Mr. Holmes; he was treacherous to his friends, abandoned in his morals, and miserable in his end. Yet the early part of his career was brilliant and promising. He was at the theatre in London, soon after the war of the revolution, at the representation of a piece which caricatured American manners and principles, and afforded great delight to the audience. In one portion of the exhibition, the Americans were represented as a nation of shoemakers, pedlers and tinkers; this sally was received with rapturous applause. As soon as it subsided, Bartlett arose from the pit, and shouted, "Great Britain beaten by a nation of shoemakers, pedlers and tinkers, by ——." The suddenness of the retort electrified the house, and they bestowed upon him more applause for his boldness, than they had before upon the players. Bartlett became intemperate; he left Saco in 1808, and settled awhile in Portsmouth: here he was reduced to his last expedient. His latest appearance in court was on the occasion when he had for a client a poor vagabond named *Cæsar*, than whom himself was hardly better; the judge reproved him for representing such a case and such a client; he respectfully replied, although half seas over; "May it please your honor, it is '*Aut Cæsar aut nullus.*'" [1]

Mr. Bartlett, while he resided at Saco, had a libel suit against the publisher of the Argus, a democratic paper published at Port-

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for his text the words, "Remember them that are in bonds as bound with them." After he had finished his discourse, which was an able one, Mr. Holmes observed, that whatever might be justly said against the institution of slavery, he did not think the text ever had or was intended to have any application to the subject; it related to a very different affair. The application of it to domestic slavery reminded him of a clergyman who preached from this text, "and David took from the brook *three* smoth stones." "Now, my hearers," said the preacher, "by these words, I intend to prove, explain and illustrate the doctrine of the *Trinity*." "It was *five* smooth stones," said the deacon, in a low tone, very respectfully. "We will see," said the preacher, opening the book with some excitement, and read deliberately, "And David took from the brook *five* smooth stones." "Well, my hearers," said he, "I made a small mistake in the *fact*, but it makes not the slightest difference in the *argument*."

[1] Bartlett wrote poetry and aphorisms, which were published, but have followed their author to obscurity. He perished in an almshouse, the result of profligate habits and shamefully abused talents.

land, and another upon the jail bond, given by the defendant in this case, growing out of political questions, which are no doubt freshly remembered by some of the parties now living. The latter case, which was a very severe one for the defendant, was argued by solicitor Davis and Samuel Dexter for the plaintiff, and by the famous Barnabas Bidwell and Mr. Justice Story of Massachusetts, for the defence; a report of it is contained in the Massachusetts Reports, volume 3, page 86. The former was conducted by Mr. Mellen, Mr. Emery and Mr. Holmes for the plaintiff, and Cyrus King and Judge Wilde for the defendant. There was much irritation and sparring between the counsel; the case was closed by Judge Wilde for the defendant, in a clear, concise and highly finished argument, which produced a deep sensation. Mr. Mellen was also very able in his closing argument for the plaintiff.

One of the principal competitors of Mr. Holmes at the bar and in politics, was Cyrus King, of Saco, a fine lawyer and an accomplished scholar; a man of ardent temperament, inflexible principle and elevated moral character. Mr. Holmes frequently took advantage of the irritability of his temper to gain advantages over him at the bar. By the coolness of his own temper, he often succeeded in this attempt. Mr. King was elected to congress in 1813, re-elected in 1815, and was succeeded in the next congress by Mr. Holmes. While there, he distinguished himself by his earnest and able opposition to the war measures and to the policy of Mr. Madison.

Mr. Holmes was not content with the quiet pursuit of his professional duties, although he had an extensive and profitable business. "The gladsome light of jurisprudence" was not bright and warm enough for him; — he loved law, but he loved politics more; he was ambitious, and like too many of the profession, he abandoned the embraces of the most noble of sciences for the strife of politics. How many thousands who have embarked their proud hopes and anxious expectations upon this wild and stormy sea, after a course of imposing but transient grandeur, have been swept away into entire forgetfulness, while the names of the upright judge and the learned jurist, the Hales, the Mansfields, and the Marshalls, continue fresh and fragrant, as the benefactors of their race!

Mr. Holmes was of a sanguine temperament and ambitious of distinction. He began life as a federalist of the old school, and was not backward in making his principles known and felt. He was elected by that party in 1802 and 1803 to the legislature of Massachusetts from Sandford and Alfred. But the federal policy, although it had the ascendency in Massachusetts, was not to the taste of the

people of his town or county, nor indeed to the majority in Maine. He could not, therefore, succeed any more as the candidate of that party; still he labored on in the cause with great ardor, hoping against hope, through the exciting periods of the embargoes and non-intercourse, when, finding that there was no stemming the tide of democratic principles, he yielded to the storm like many of his contemporaries, and trimmed his sails to the prevailing wind of popular favor.[1]

In the latter part of 1811, he became the advocate of the national administration, and the war measures of Mr. Madison. And immediately on the next election he was returned a representative to the general court of Massachusetts from Alfred. So high stood his reputation with his new friends, that he was their candidate for speaker of the house, in opposition to the old incumbent, Timothy Bigelow. A large majority of the house were the political friends of Mr. Bigelow, and he was reëlected; but Mr. Holmes became an untiring assailant of the measures of the majority, and a vigorous partisan and active leader of the party which he had espoused. He was elected to the senate of Massachusetts in 1813, and continued a member of that body during the trials and excitements of the war, boldly sustaining the policy of the national government, and contending fearlessly and with unabating ardor against all the anti-war measures of Massachusetts.[2]

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[1] In this connection we cannot forbear presenting our readers with a specimen of Mr Holmes's poetical talent. In 1810, a democratic caucus was held at Kennebunk for the selection of candidates. It was said by their opponents, that, disregarding the modern rule of total abstinence, they determined to try the efficacy of treating at the election. Mr. Holmes, with a good deal of tact, seized upon this topic, and published the effusion in six stanzas, from which we copy the following: —

KENNEBUNK CAUCUS.

SONG.

"The York County *Demos* of late had a meeting;
The object was great, but the party was small.
The marshal had issued his circulars greeting,
To tag, rag and bob-tail to meet at his call.
He called for attention
While he made objection
To Gore's reëlection,
And wished they 'd be *mum*;
But while he was stating
The cause of the meeting
The caucus was prating
And calling for — *rum*.

[2] Mr. Holmes was appointed Lieutenant Colonel in Col. Lane's Regiment, United States Army, in 1813, but declined the appointment.

The situation of Mr. Holmes in the legislature was one which would have exceedingly embarrassed a man of ordinary firmness or less buoyancy of mind. The suddenness of his change of sentiment, and the zeal with which he advocated the cause to which he had devoted himself, became the subject of severe rebuke on the part of his former associates. The keen severity of Daniel A. White, the polished irony of Harrison Gray Otis, the caustic humor of Josiah Quincy and Judge Putnam were not spared in the frequent and sharp encounters which the political heats of the day engendered. And it would be doing great injustice to Mr. Holmes not to say, that he sustained himself with great ability in these trying and unequal contests. For wit he returned wit, and full measure, for argument, argument, and on all occasions preserved his coolness; "even when refuted, he could argue still." He was a ready debater, never taken by surprise, and when argument was deficient or unavailing, he pressed into his service the auxiliaries of wit.

In 1815, he was appointed by Mr. Madison, commissioner under the fourth article of the treaty of Ghent, to make division between the United States and Great Britain, of the islands in Passamaquoddy bay. The next year he was elected a representative to congress from York district to succeed Mr. King, and reëlected in 1818 without opposition, having received eleven hundred and six out of eleven hundred and eighty-two votes. This latter was a period when parties were in a transition state, and little excitement agitated the public mind. While he was discharging the duties of commissioner and member of congress, he was actively engaged in effecting the separation of Maine from Massachusetts. He not only labored in this work, but he led in it, and as a leader he had to bear the blame of whatever measures of his party were injudicious or unjustifiable.

In the proceedings of the Brunswick convention, which reported a constitution, on the assumption that the requisite majority of five ninths had been obtained, he sustained a liberal share of abuse. He was not, however, the author of the political arithmetic which converted five ninths of the aggregate majorities of the corporations into a majority of five ninths of the legal voters of the district. He indeed signed the report of that committee as the chairman, and thus the paternity of that calculation was cast upon him. It is unnecessary to say, that the plan did not succeed, the legislature of Massachusetts not being inclined to sanction so palpable a perversion of the plain import of language. The next attempt, however, at separation, succeeded: and a convention met at Portland, in October, 1819, composed of the most prominent and able men in

Maine, to form a constitution of government. Mr. Holmes was appointed chairman of the committee which drafted the instrument, and took a conspicuous part in all the discussions which led to the adoption of the constitution under which the people of Maine now live.

In 1820, he was elected the first senator to congress from the new state, and continued to hold that honorable station, by renewed election, until 1827. In 1828 he was again elected to the senate, for the unexpired term of Judge Parris, who was appointed to the bench of the supreme court, in June, 1828. In 1833, his congressional life ceased, and he returned, with all the freshness of youth, to his first love, the practice of the law, after an uninterrupted and most successful political career of over twenty-two years, in which there was not a year when he was not occupying some public station. In 1836 and 1837, he was elected a representative from Alfred to the legislature of Maine, and in 1841, he was appointed by President Harrison, attorney of the United States, for the Maine district, in which office he died.

Few persons have had their ambition more fully gratified than Mr. Holmes. The road of public life was freely opened before him, and he appeared to have attained, whatever in that direction he most desired. That he acquired a very exalted or enviable reputation cannot be awarded him; he may rather be considered a skilful partisan, than an able statesman; he directed his energies to skirmishing and hanging upon the flanks of his political opponents, rather than striking out any great and permanently useful measures. His popularity at one time in Maine was very great, and he managed matters in his own way. In reviewing the life of such a man, we may perhaps derive a useful reflection upon the danger, not to say folly, of leaving the broad highway of an honorable and profitable profession, for the fitful and the exciting pursuits, and the unsubstantial rewards of the mere politician. That Mr. Holmes had as much of popular favor and its fruits, as falls to the lot of men, none will deny; that they furnished him the satisfaction and the rewards which he would have acquired in the quiet progress of his profession, we do not believe.[1]

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[1] The sentiment we would inculcate is, that members of the profession should not waste their energies, nor destroy their peace of mind, in the exciting and unsubstantial pursuits of political ambition. The idea is finely expressed by the elegant wit and scholar, Sir Henry Walton, who, three hundred years ago, had ample experience on this subject. Speaking of him who keeps aloof from "princes' favor and the vulgar breath," he says,—

"This man is freed from servile bands
Of hope to rise or fear to fall—
Lord of himself, tho' not of lands,
And having nothing, yet hath all."

Whatever estimate may be formed of Mr. Holmes's public life, there is no diversity of opinion in regard to his private and domestic qualities. He was a kind husband, a tender and judicious parent, and a good neighbor. As a townsman, he was exceedingly vigilant in promoting the interests of his fellow citizens in the matters of education, internal improvements, and whatever related to their municipal interests. From the time he settled in Alfred, he never ceased his exertions until he procured all the courts to be held in that place, which was finally accomplished in 1833. He also succeeded in having the route of a railroad from Portland to Dover laid out through his adopted town, but failed in raising the means to complete it.

Mr. Holmes was twice married; his first wife was Sally Brooks, of Scituate, to whom he was united in September, 1800. By her he had all his children, two sons and two daughters, of whom the sons and one daughter survive. His eldest daughter married the Hon. Daniel Goodenow, judge of the district court of Maine, for the western district, including the counties of York, Cumberland, Oxford, and Franklin. She died a few years since. His second wife was the widow of Henry Swan, and the accomplished daughter of General Knox, to whom he was married in July, 1837. He moved the next year to her seat in Thomaston, the late residence of her father, where he continued the principal portion of the time, until his appointment as district attorney, when he divided his residence between Portland and Thomaston. He devoted that period of his life to the preparation of a digest of public and private law, which he published in 1840, under the name of the "Statesman," in one octavo volume. In this work he passes rapidly through the circuit of jurisprudence, contenting himself by presenting a succinct statement of general principles in constitutional and municipal law.

It is satisfactory, in closing this account of a man who has occupied, for many years, so large a space in public opinion, to be able to say that the last scenes of his life were calm and delightful — life's fitful fever was over; the pageantry had passed before him in all its gaudy drapery; his heart was weary of it, and sought that rest which only can be found in a close communion with its divine author. His intellect was clear to the last; his faith was unclouded; he knew in whom he trusted, and exhausted nature surrendered up the spirit, without a murmur or a struggle, to the hand that gave it.[1]

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[1] The United States district court being in session, the morning after Mr. Holmes's death, Judge Emery, the only survivor of the York bar, when Mr. Holmes

Recent American Decisions.

Circuit Court of the United States, Maine, May Term, 1842, *at Portland.*

Wood *v.* Carr.

Set-off: — All actions and matters of difference between the parties having been referred to referees, they made separate reports, upon which executions issued and were placed in the hands of the sheriff. Before the executions were issued one of the parties assigned the amount he might recover to third persons, who had full notice of all the facts. *Held*, that the assignee was not within the meaning of the proviso of the statute of Maine of the 13th March, 1821, ch. 6, § 4, the claim not having been "assigned to him *bona fide* and without fraud;" and that the sheriff had a right to set off one execution against another, notwithstanding the notice given to him of the assignment.

The defendant, being sheriff of the county of Penobscot, had an execution placed in his hands for collection issued on a judgment recovered by the Bangor House Proprietary against the plaintiff. He had also placed in his hands for collection an execution issued on a judgment recovered by the plaintiff against the Bangor House Proprietary. Thereupon, at the request of said Proprietary, the defendant satisfied the plaintiff's execution by setting the amount thereof due and unpaid off upon the execution in favor of the Bangor House Proprietary, indorsing said amount on said execution in part payment and satisfaction thereof. This action was brought against the defendant for an alleged misfeasance in making the said set off. It appeared in evidence, that the plaintiff and the said Proprietary having got into difficulty and dispute several actions were brought by the Proprietary against the plaintiff; all of which were referred with all matters of difference between the parties

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entered it, except Judge Dana, of Fryeburg, communicated to the court, in a highly appropriate manner, the intelligence of the decease of the United States attorney. Judge Ware briefly replied, expressing his high sense of Mr Holmes's merits, and his sympathy with the bar on the occasion, and observed he was ready to unite with them, in paying the last tribute of respect to his memory. The court was immediately adjourned, and the bar then adopted appropriate resolutions, and attended his remains, the next day, to their final resting place. Appropriate services were performed in the High street church, which he attended, and he was buried under masonic honors.

to three persons. The referees made separate reports in and by way of final disposition of each of the said actions, and the judgments on which said several executions issued were judgments in pursuance of and upon acceptance of said referee's report. After the said referees had so agreed to report, the plaintiff assigned the amount he might recover in the action in which judgment was entered up in his favor, and execution issued as herein before stated to third persons for the consideration and purposes therein expressed. And this action was brought by such third persons in the name of the plaintiff for such third person's benefit, who well knew the whole transaction and facts here stated. A verdict was taken for the plaintiff, by consent, subject to the opinion of the court. If the sheriff had a right to make the set off, he having been notified of the assignment, the verdict was to be set aside. If he had by law no right so to do, but was bound to collect the amount, and pay the same over to the assignee of Wood, said Wood being insolvent at the time of said assignment, then judgment was to be entered on the verdict.

The statute of Maine, of the 13th of March, 1821, ch. 6, § 4, provides that whenever any sheriff shall at the same time have several executions wherein the creditor in one execution is debtor in the other, he may cause one execution to answer and satisfy the other so far as the same will extend; with a proviso (among other things) that it shall not "affect the rights of any person to whom or for whose benefit the same judgment or execution or the original cause of action thereof, may have been assigned bona fide and without fraud."

The case was briefly argued at this term, by *W. P. Preble* for the defendant, and by *C. S. Daveis* for the plaintiff. For the defendant was cited *Hatch* v. *Greene*, (12 Mass. R. 195); and for the plaintiff *Green* v. *Darling*, (5 Mason's R. 202), and *Howe* v. *Sheppard*, (2 Sumner's R. 409.)

Story J., after stating the facts, and reviewing the decisions, said: I have no doubt whatsoever, that the assignment having been made with a full knowledge of all the facts, the assignee must take the same subject to all the known equities between the original parties. To give it any other and further effect would, in my judgment, contravene the policy of the statute of Maine, and make it an instrument of injustice, as well as of fraud. In no sense can an assignee be said to be a bona fide holder of an assignment without fraud, who, by procuring that assignment, seeks to defeat

the just rights of the other party. Notice is universally deemed, if not at law, at least in equity, to place the party in the situation of a trustee, as to all the rights, which he acquires, affected by that notice. He, who has notice of equities, which he seeks to defeat, is, in the eyes of a court of equity, deemed guilty of a constructive fraud; and he is not a bona fide holder, although he may have paid a valuable consideration therefor. In the sense, then, of the statute of Maine the assignee is not within the saving of the proviso; for the claim has not been "assigned to him bona fide and without fraud."

It appears to me, therefore, that the verdict for the plaintiff ought to be set aside. I wish to add, that there is nothing in the case of *Greene v. Darling*, (5 Mason's R. 202), or that of *Howe* v. *Sheppard*, (2 Sumner's R. 409), that in the slightest degree infringes the doctrine stated in the present opinion.

Verdict set aside.

District Court of the United States, Massachusetts, April, 1843, *at Boston. In Bankruptcy*

IN THE MATTER OF GRANT AND OTHERS.

On a note made payable "on demand after date with interest," there were demand and notice more than five years after date. *Held*, not within a reasonable time.

The mere fact that the indorser of a note is a member of the firm by which it is made, will not excuse a demand and notice, although the firm were insolvent when the note was given, and the indorser knew that it was not paid.

A member of an insolvent firm, in settling up their concerns, gave a note signed by the firm, payable to his own order "on demand after date with interest," and by him indorsed. No demand was made and notice given, until after five years from the date of the note. *Held*, that the private estate of the indorser, in bankruptcy, was not liable for the amount of the note.

THIS was a motion by the assignee to expunge a proof of debt, filed by the Globe Bank against the private estate of Benjamin B. Grant, as indorser of a note for thirty-six thousand dollars, signed by Grant, Seaver, & Co., a firm of which Grant was a member, and which was in bankruptcy. The Globe Bank also proved the same note against the copartnership estate of the bankrupts, as makers of the note, claiming a dividend on the balance due, about eighteen thousand dollars, against the separate estate of Grant, as indorser, and the joint estate of the partners, as makers, in accord-

ance with *Farnum's case*, *ante* p. 27. The note in question was made on September 26, 1838, payable "on demand after date with interest." There was no demand on the makers, or notice to the indorser until February 19, 1843. At the time the note was given, Grant, Seaver, & Co. were insolvent. Grant was principally engaged in closing up the business, and this note was given to the Globe Bank by him on a settlement, it being for the balance then found to be due to the bank. The note was not proved until the second dividend was about to be declared; and the assignee moved to expunge the proof against the private estate of Grant, on the ground that he was not liable as indorser of the note.

H. H. Fuller and *P. W. Chandler* for the assignee.

Charles B. Goodrich for the Globe Bank.

Sprague J. The question first presented at the bar relates to the demand and notice. Was any demand necessary; and if so was it made in a reasonable time, or has it been waived? The note was payable on demand after date with interest. No demand was made until after the lapse of five years and four months — and not only after the makers and indorsers had all gone into bankruptcy, but nearly six months after the first dividend on the estates had been declared; nor until after the proof of debt in this case by the bank.

Without undertaking to determine with precision what would be a reasonable time for making a demand, it is sufficient to say, that there is no precedent or opinion which allows a latitude approaching to the length of time which had elapsed here. All the parties here have during the whole term remained in Boston; and I am of the opinion, that if from the circumstances of this case, a demand could be delayed until the 14th of February last, and until after this very proof of debt now moved to be expunged was made, it could be dispensed with altogether. It is contended, that the offer of Grant to compromise and settle the note, was a waiver by him as evidence of demand and notice. The evidence does not, I think, warrant such an inference. He was endeavoring, as he states, to settle the affairs of Grant, Seaver, & Co., the makers, and that in his conversations with the officers of the bank it was always credited as the debt of the firm, and his indorsement was never referred to. Nothing was said or done with reference to his indorsement, and which might not well have exclusive reference to the obligations of the makers. The question then, is, whether a demand was necessary.

It has been finally urged that it was not. First, because Grant, the indorser, was a member of the firm of Grant, Seaver, & Co. and always knew that the note was unpaid, and the makers had no means of payment. The cases cited most directly to this point were *Gowan* v. *Jackson*, (20 Johnson, 176); and *Porthouse* v. *Parker*, (1 Camp. 82).

They are both cases of a bill drawn by one partner on the firm, and duly *presented* for acceptance and payment; but *notice* of refusal not given to the drawer, and it was held, that as the drawer was one of the persons who had *refused* acceptance or payment, and must therefore have known of the dishonor, notice of that fact need not be given. In the case before us, there was no *demand*. *Dwight* v. *Scovil*, (2 Conn. 654), cited on the other side, was an action by the indorsee of a note against the indorsers. One of the firm which indorsed the note was also a member of the firm which made it; but it was decided, that demand and notice were necessary. *Dickins* v. *Beal*, (10 Peters, 572), was a case of a bill drawn without funds or authority to draw; a demand was duly made, but notice not given. It was held, that the drawer was not entitled to notice. In *Copp* v. *McDougal*, (9 M. R. 1), the payee of a note had negotiated it, knowing that it was not valid against the makers, and after the indorsee had failed in a suit upon it against the maker, he told the indorsee he was ready to pay it. *Held*, that no demand or notice was necessary. These are all the cases which were cited in the opening argument to sustain this position. Neither of them is precisely in point. The cases subsequently added are not more so.

The second ground for dispensing with demand and notice, is, that Grant had the custody and control of the property of the makers, as a member of the firm, and also by an appointment of the copartners to settle their affairs. Grant states that he conducted the settlement and adjustment of the affairs of the company. But he does not state, that he had any new and special authority or conveyance of property for that purpose; and I do not think that we are to infer, that he had any other custody or control of the property than as a corporation. It has been held, that where an indorser had received a conveyance of property from the maker of a note for the express purpose of securing him against his indorsement, demand and notice may be dispensed with. Such were *Mead* v. *Small*, (2 Green. R. 207), and *Bank* v. *Griswold*, (7 Wend. R. 165); and the earlier case of *Bond* v. *Farnham*, (5 M. R. 170), in which the court take the ground, that when the indorser represented to the maker, that he was liable and took se-

curity, he undertook to pay absolutely; that the intention was, that his promise should be no longer conditional; and in *Prentiss* v. *Danielson*, (5 Conn. R. 175), the court consider the taking such security to be a waiver of demand and notice, in other words an absolute promise to pay. In these cases, the makers, by the intervention of the indorser, were either wholly or in part deprived of the means of payment. In the case before us, whatever property Grant held, was in his control at the time of making the note and in his character of copartner, that is, as one of the makers.

But it has been urged with much force, that those cases, although not in all the circumstances precisely like the present, establish a principle which embraces it, that a demand is not necessary when it would be wholly vain and useless. These cases rest either on some deceptive practice, as in drawing without funds, transferring a void note, or on the supposed intention of the parties not to require an act wholly useless. The paramount principle of all the cases dispensing with demand and notice, is to carry into effect the honest intention of the parties and do substantial justice between them. This controlling principle is to be kept constantly in view.

The indorser of a note is bound only by virtue of his contract. That contract is such as he chooses to make it. If he indorses in blank, the law implies a promise to pay on the condition of due demand and notice. Under certain circumstances, the law implies an absolute promise: that is, presumes that it was the intention of the parties to dispense with a condition wholly useless. All the reasoning of the cases and the rules laid down and exceptions introduced, are only to ascertain and carry into effect the real and honest intention of the parties.

Suppose Grant, in this case, when he made his indorsement, had expressly stipulated, that he should not be holden in any event as indorser, nobody doubts that he would have been protected from liability, and if he had expressly stipulated, that he should be holden only after demand and notice, it is clear, that such condition must have been complied with. The manifest intention of honest parties must be carried into effect, and circumstances are resorted to only to ascertain such intention when left in doubt. It is to be borne in mind, that all the facts which go to dispense with demand, existed at the time the note was indorsed; and if Grant is liable, it must be on the ground, that it was then intended that he should be bound absolutely and without condition.

It is not contended, that there was any express promise by Grant, to pay absolutely as indorser; but it is urged, that the note was not made for circulation, discount, or commercial purposes,

but under peculiar circumstances, and therefore that Grant is not entitled to claim the privileges of general commercial paper. In other words, that the law, from these circumstances, implies an absolute and not a conditional promise to pay. On the other hand, it is insisted, that the legal inference, from these extraordinary circumstances, is precisely the reverse; that so far from raising an absolute promise, they imply no promise whatever. Indeed, the learned counsel went further, and urged, that the whole circumstances of the case furnished proof, that it was expressly agreed, that Grant should not be holden as indorser. But I do not see any satisfactory evidence of such express agreement, and if any such had been made, it is reasonable to suppose, that the indorsement would have been without recourse; and, on the other hand, if there had been an actual agreement to be holden absolutely, it would probably have been expressed by an indorsement waiving demand and notice, to prevent all doubt.

The truth manifestly is, that it was not deemed by the parties, at the time, a matter of any importance whether Grant was holden as indorser or not, and they took no care or thought about it. Grant being bound, at all events, as maker of the note, the bank had as perfect right to resort to his private property, as well as that of the firm, as if he was also holden as indorser. The firm had failed, having been indebted to the bank, in a much larger amount, upon which payments had, from time to time, been made. When they came to account together, it was found that this balance of about thirty-six thousand dollars, was due from the firm, and, thereupon, as a matter of convenience, the paper previously holden against the firm, was given before, and this new note was made. Grant made the settlement, signed the name of the firm to the note as makers, inserted his own name as the person to whose order it was to be paid, and then indorsed it in blank. This was the only consideration, and although it might be sufficient in law to sustain an actual promise by the indorser to pay, yet, in considering what was the real intention of the parties, and the rights and obligations which the law will imply, the fact, that nothing of actual value was parted with, or received, is not unimportant. The bank held collateral security, which Grant says he always considered sufficient, or nearly sufficient, to secure this note. That they did not, in fact, regard the indorsement as of any moment, or rely in any degree upon it, is manifest from other circumstances. They well knew the general rule of law, that indorsers are not holden without demand and notice. Grant, and the members of the firm of Grant, Seaver & Co., all lived in Boston; yet for more than four years

they take no step to render his liability certain, either by demand and notice or taking his waiver thereof.

On the tenth day of January, 1843, the bank, by its president, came forward to prove this debt against the indorser; and this was the first claim they ever made against him. That they did not rely on the circumstances of the case, as dispensing with the necessity of demand and notice, or on any agreement to waive, is manifest from the proof made before the commissioner, in which due demand and notice are stated, and the liability of the indorser put upon the fact of such diligence, and nothing stated of any facts, circumstances, or agreements dispensing therewith. A motion was made to expunge this proof, after which, for the first time, demand was made and notice given, and also the ground taken, that no such diligence was necessary.

This is not all. Grant, whose deposition has been introduced by the bank, testifies, that he endeavored, from time to time, to make an adjustment and compromise of this note with the bank; that he had not less than half a dozen conversations with the officers for that purpose; and that "the subject of his individual indorsement was never referred to between them; that it was always treated as a debt of Grant, Seaver & Co."

It is objected by the learned counsel for the bank, that it is not open to the assignee here to prove that it was not intended that Grant should be holden as indorser; that the law fixes the meaning of an indorsement, and that evidence cannot be admitted to contradict the instrument. The admissibility of such evidence has been, heretofore, matter of controversy. I do not think it necessary to decide that question, because all the evidence here was introduced by the bank. In *Reed* v. *Jewett*, (5 Green. R. 96), and *Smith* v. *Tilton*, (1 Fairfield's R. 350), it was decided, that a written contract may be controlled by parol evidence, introduced by the party who subsequently objects to its effect. But here, this evidence was introduced by the bank, for the very purpose of changing the legal effect of this indorsement, to make it an absolute promise instead of a conditional one; and this is essential to their case, for as the circumstances relied upon existed at the time the note was indorsed, the contract then made is that which still binds the parties. The case of *Gerhard Bank* v. *Comly*, (2 Miles's R. 405), was in many respects similar to the present. No question of the admissibility of evidence arose, but its effect was considered, and the court held, that the indorsement created no liability. In the present case it is not sufficient for the bank to show, that some liability was assumed by the indorsement. They must go

further and show, that it was not the usual conditional promise which an indorsement imports, but an absolute obligation to pay at all events.

We have seen, that no such absolute promise was in fact made or intended. Is it implied by law? No precedents precisely in point are found, and no rule that embraces all the circumstances of this case. We are left then to decide it upon the true principles applicable to the case. But, as has already been remarked, the paramount principle of the cases dispensing with notice, is to do substantial justice, to carry into effect the real intention of the parties. When the law raises implied promises, it is to require parties to do, what in equity, in good conscience they ought to do, and what as honest men, it may be presumed they intended to do.

I do not think, that justice requires that Grant should be holden as indorser, or that he was ever under any moral obligation as such, and although some of the circumstances, if standing alone, might perhaps have been sufficient to raise a legal implication of an absolute promise, yet they are neutralized at least by other circumstances of an opposite tendency, and from the whole no such promise is to be inferred.

The proof must be expunged.

Supreme Court, New York, May Term, 1843, *at Albany.*

UNITED STATES *v.* WYNGALL.

Held, that the enlistment of aliens in the army of the United States is binding both on the government and the persons so enlisted.

THE defendant in error, an enlisted soldier in the army of the United States, was discharged on *habeas corpus* by a supreme court commissioner of the county of Jefferson, on the ground of *alienage*. The United States sued out a *certiorari* removing the proceedings into the supreme court, where the case was argued at the last January term by *J. A. Spencer*, United States district attorney, for the plaintiffs in error, and by *S. Stevens* for the defendant in error. At the recent May term, the court directed a rule to be entered reversing the decision of the commissioner, for the reasons stated in the following opinion:

COWEN J. It is contended, in the first place, that Wyngall was properly discharged, because no statute expressly confers power

upon recruiting officers to enlist aliens. This argument proves too much. To allow it, would be to decide that few, if any, of our enlistments are authorized by law. There is, perhaps, no statute expressly conferring authority upon any particular person, to enlist troops of any kind. At all events, there was no need of such a statute. The authority is inherent in the national sovereignty, which, in the exercise of another inherent right, had already delegated the authority to the president. The statutes concerning the military forces of the United States, therefore, have generally assumed that the president, as the commander-in-chief and executive officer of the government, possesses the constitutional power to levy troops and fill up the ranks of the army, provided for by law in general terms, with such men as he shall think proper, unless restricted by special provision. There can be no doubt that a statute, by simply fixing the war or peace establishment of the nation, would, without anything more, confer authority upon the president to receive into the service such persons as do not labor under any personal disability to make the contract of enlistment. The same remark applies to all the proper military agents of the government acting under the contract of the president — commissioned officers, for instance, engaged in recruiting, mustering and commanding troops. When a statute directs that a measure shall be taken, it must be understood as referring its execution to the proper existing agents, and to annex, by implication, all the ordinary means for carrying the measure into effect. It lies with the counsel for the soldier, therefore, to show that some statute or some principle has made aliens an exception from the number of those who can be enlisted into our armies. The counsel thinks he has found such an exception in the eleventh and twelfth sections of the act of March 16, 1802. (3 Bioren, 450.) That statute, after fixing the peace establishment at three regiments, prescribing the number of officers and privates, providing for pay, rations, clothing, &c., and after giving certain directions to the president as to discharging, retaining and arranging the officers and troops already in the service, conformably to the reduced limit of the establishment, and declaring that the whole corps shall be governed by the rules and articles of war, enacts (§ 11) "that the commissioned officers who shall be employed in the recruiting service to keep up by voluntary enlistment the corps as aforesaid, shall be entitled to receive for every effective able-bodied *citizen of the United States*, who shall be duly enlisted by him for the term of five years, and mustered, of at least five feet six inches high, and between the ages of eighteen and thirty-five years, the sum of two dollars." There is then a provi-

sion that this regulation shall not extend to soldiers reënlisting; and that minors shall not be enlisted without the consent of their parents, guardians or masters respectively, if they have any. Enlisting any person contrary to the true intent and meaning of the act is called an offence, and the amount of the bounty and clothing of the unsuitable recruit is to be forfeited and deducted from the officer's pay and emoluments. The twelfth section declares, that "there shall be allowed and paid to each effective, able-bodied citizen recruited as aforesaid, to serve for the term of five years, a bounty of twelve dollars." The act of March 2, 1833, § 5, (8 Bioren, 813–14), repeals the premium to officers for enlisting recruits, and takes away the bounty; but it cannot perhaps be relied on as affecting the previous directions concerning their personal qualities. These sections are admitted to contain the only express enactments now existing, in any manner restricting enlistments to citizens of the United States. It is further conceded that the secretary of war, in his instructions to recruiting officers, has mentioned the quality of citizenship as a material requisite. The words relied on as a limitation of power, taken according to their literal meaning, do not forbid the enlistment of aliens, or any other person; but only declare, that for every citizen, &c., so much shall be allowed as a premium, and so much paid for bounty. The power given by the whole statute then, read in this way, and in reference to the general power of the President, is, to hire such soldiers as he or his recruiting officers may think proper, without any particular regard to strength, citizenship or size; provided that, if the prescriptions of the statute be departed from, neither premium nor bounty shall be allowed. It merely intimates a preference of the citizen to the foreigner. No doubt it has properly been considered by the war department as containing directions which should be followed, so far as may be practicable. But giving to it the greatest possible effect, it is plain that all the restrictions are for the benefit of the government, not the recruit; and if a departure do not contravene some general principle of public policy, the question would seem to lie entirely with the government, whether it will forego the requisites wanted by its new recruit, or dismiss him. *Quilibet potest renunciare juri pro se introducto.* An officer, for instance, engaged in the recruiting service, chooses to enlist a man over the age of thirty-five, or less than five feet and six inches in height. He is mustered, and the proper agents of the government insist on holding him to his contract. There is nothing either in the words or intent of the statute entitling the recruit to avoid his bargain because he fails in those qualities which the government would have preferred.

It may punish the officer for his carelessness or delinquency; but, on the statute, no other consequence would follow. I entirely agree, that, if the part of the statute which mentions the personal qualities of the recruit were the sole foundation of the power, the existence of those qualities would then be a condition, and, in their absence, the enlistment would be void. I entertain no doubt, however, that it is a statute at most of restrictory direction as to the exercise of powers before conferred. The circular from the secretary of war cannot narrow those powers; nor is it pretended that his instructions must be looked to as the foundation of them. Both the statute and the circular must be understood to say in effect, "Enlist such recruits as you shall deem suitable; but if you disregard certain requisites, you shall lose the premium, and be considered open to the censures of your department."

The distinction between the consequence of violating a statute which prescribes certain requisites essential to the validity of an act, and a statute directory only, is entirely familiar. In the former case the act is void; in the latter it is valid; and if it relate to a contract, it is binding upon both parties. The consequence, therefore, is, if we are right in considering the eleventh and twelfth sections directory only, that the enlistment in question is binding both on the government and the soldier. The case of *Rex* v. *Birmingham*, (2 Man. and Ryl., 230; S. C. 8 Barn. and Cr. 29), is full to the point. (See Dwarris on Stat., 715.) But suppose that the immediate agent making a contract with another, wants authority; that does not preclude those who have it from adopting the contract and insisting on performance. Though the recruiting officer might have been forbidden by the statute, and so incapable of contracting, the recruit was mustered and received as a proper man into the service, and detained till wrested from his captain by the *habeas corpus*. The government resisted his discharge, and have brought a *certiorari* to test its validity. May we not apply to such a transaction the maxim, *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur?* "If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it. But if, with full knowledge of what I have done, he ratify the act, he will be considered to have contracted originally by my agency; for the ratification is equivalent to an original authority." 1 Liverm. on Agency, 44.

But it is said that the statute is declaratory of a rule of general policy, a departure from which is *contra bonos mores;* and that the law withholds its aid from a party who claims to enforce an im-

moral or illegal contract. The word *offence* is indeed used in the statute; and perhaps means to characterize the act of enlisting an alien, as well as a minor without the consent of his guardian. Neither act, however, would be indictable; and the only consequence, as we have seen, is a deduction from the officer's pay. It becomes a mere matter of account between him and the government. The word *offence* seems to be used as importing no more than a departure from the direction given. The officer has *offended* against the direction of the statute, and thus failed to earn the premium and his full pay. The misfeasance is not, therefore, *malum prohibitum*, within the rule relied upon. We say, in the same sense, an agent *offends* against the instructions of his principal; a servant against those of his master. The word is used in a civil sense, and followed by civil consequences only. It is supposed, however, that, independently of the statute, there is such an unfitness in an alien enlisting into our army, thus obliging himself to fight perhaps against his own country, that the act is criminal by the law of nations. We were not referred to any publicist who has advanced such an opinion; nor are we aware of any. There is nothing in the law of nations which denies to a subject the right of expatriation. On the contrary, the right is asserted by all approved writers on that law; sometimes, indeed, under qualifications; but every man must in effect be his own judge whether he will continue subject to the government under which he was born, or transfer his allegiance to another. Hardly any nation in the civilized world, whose subject has expatriated himself, would, at this day, claim to treat him, even in time of war with his adoptive country, as still bound by his original obligations. I speak not of the common law, nor any that is merely local to the country of his first residence; but of the rules which govern the intercourse of nations in their corporate capacity. (See Vattel, B. 1, chap. 19, § 220 to 226. Du Ponceau's Bynkershoek, chap. 22, n. 175.) Emigration, enlistment, and taking the soldier's oath, is effectually a change of allegiance. Though it do not confer all the rights of citizenship, it is a naturalization *quoad hoc;* and if the expatriation be *bona fide* there is nothing contrary either to law or morals in the soldier fighting against his original country, should a war break out between that and the one into whose service he has chosen to enter. Being domiciled in the latter for any purpose, his native country would not, in time of war, discriminate between him and his neighbors. The person and effects of each would be alike exposed to the violence and ravages of the conflict; and both would be equally entitled to defence and protection from his adoptive country. Who would deny that, un-

der such circumstances, he might properly render assistance of any kind toward the common defence? But whether he may resist his own country or not, he may enlist in foreign service, binding himself in general terms and acting accordingly, so long as his country is at peace with the state to which he engages himself. The right to do so much even without an intent to transfer his allegiance has always been recognised in practice, and forms a familiar head in the works of publicists. Vattel pronounces it to be always lawful, many times laudable; — and he defines the obligations which spring out of the relation thus created. (Vattel, book 3, chap. 2, § 13–14.) Bynkershoek maintains that you may enlist aliens even in the territory of their sovereign, if he be in amity with you. (Du Ponceau's Bynkershoek, chap. 22, p. 174.) Any one in the least conversant with European history will recollect numerous illustrations of this doctrine. I speak not of auxiliary forces furnished by one nation to another; but of individuals or associations bargaining away their services to a foreign prince. In proportion as the system of feudal militia gave way to that of disciplined troops, arms became a regular profession, and the trade of the mercenary soldier as common as any other. He claimed the right to carry on his trade, not only at home, but in whatever country would give the best price for his bravery and skill; and his claim was allowed. The Condottieri of the fifteenth and sixteenth centuries were constantly in the market with bands of trained soldiers. Venice, and I do not know but some other Italian states, relied on them as their sole resource in all their military enterprises. Of a somewhat similar character was the traffic carried on for several centuries by the small cantons of Switzerland and the petty princes of Germany. Davila relates that when D'Onaw, in 1587, invited by Henry of Navarre, was about entering France at the head of the Reiters, Rodolph II. sent him orders to disband. But he answered that the German nation had always enjoyed the liberty of entering themselves into pay under whom they pleased, so that it were not against the Emperor. To this, Rodolph made no reply, though he was in friendship with the League, the forces of which were then led by the French king, against whom Henry was technically a rebel. (Davila, book 8.) Clarendon mentions that in the time of the English commonwealth, no less than 40,000 Irish mercenaries hired themselves into the armies of France and Spain. During the whole course of the religious wars in Europe, both volunteers and mercenaries took sides more according to the ecclesiastical than the civil divisions to which they attached themselves. The inevitable consequence was, that people of the same country were often found fighting against each

other; and sometimes the subject against his prince. Yet the legality of the practice has seldom been questioned either in ancient or modern times, whatever casuists may have thought or written on the subject. "If it be lawful for a subject to pass into the dominion of another prince," says Bynkershoek (chap. 22,) "it must be so for him to seek the means of acquiring an honest livelihood; and why may he not do it by entering into the land and sea service? — In the United Provinces there is no law against it; and many Dutchmen, formerly, as well as in my own recollection, have served other sovereigns by sea as well as by land." He adds, "where it is lawful to let out to hire, it is lawful also to hire; and why should it not be equally so to contract for the hiring of soldiers in the territory of a friend, as to make any other contract and carry on any other kind of trade?" To the objection that the soldiers thus hired may possibly be employed against their own sovereign, he answers, "We are only to attend to the state of our country at the time; and ought not to look so far into futurity. Nor do I see any difference between enlisting men, and purchasing gunpowder, ammunition, arms and warlike stores." Whoever questioned the right of the Russian Emperor and even the Emperor of Turkey to employ our citizens in building or commanding their ships of war? The principle contended for would criminate the La Fayettes and Steubens of our own revolution. Some nations, feeling the danger of becoming enfeebled by a long peace, have deemed it highly politic to encourage the enlistment of their citizens in distant armies, with a view to their education for military service in their own. Cromwell connived at and even openly encouraged the enlistment of Irish catholics into the armies on the continent, with a view to rid himself of their rebellious opposition at home. England has long had statutes declaring that foreigners enlisting into her sea or land armaments, and serving there for a certain length of time, shall be *ipso facto* naturalized. (See 13 George 2, chap. 3; and 2 George 3, chap. 25; 1 Burge's Com. on Colonial and Foreign Law, 713.) Burge mentions a similar regulation as once existing in France. (Id. 702.) None of our own numerous acts concerning the army, previous to that of 1802, contain an intimation, as I can discover, that the recruiting service should be restricted to the enlistment of citizens; nor is it believed that, previous to this time, a doubt of the legal right to enlist foreigners was entertained by any one qualified to pronounce upon the question. The designation in the act of 1802, was adopted by reference in the act of April 12, 1808, § 5. (4 Bioren, 163.) The statute of January 11, 1812, under which the army was levied with a view to the war soon after

declared against England, gave a bounty for enlisting any effective able-bodied man of a certain age, without regard to his citizenship. (See §§ 11 and 12, 4 Bioren, 369.) Several other statutes for enlarging the army passed during the war, contain a like designation. (See acts of Jan. 20th, 1813, § 5; of Jan. 29th, 1813, § 7; of Dec. 14th, 1814, § 1; 4 Bioren, 488, 492 and 719.) At the close of the war, the President was authorized to reduce the peace establishment to ten thousand men. (Id. 825, act of March 3, 1815.) The army to be reduced had been enlisted pursuant to different statutes, several of which had most clearly authorized the reception of foreigners. Under such statutes no doubt the greater number of our troops serving in 1815 had been levied. Among these there must have been some aliens; yet the statute then fixing the establishment contained no direction that the President should distinguish between them and others, in the persons to be retained. Nor do our various statutes concerning re-enlistments, contain any such distinction.

On the whole, looking at the case independently of all statute restriction, and referring the question to international law, the validity of Wyngall's contract is clear of all doubt.

There is some difficulty, arising from much indirect and obscure legislation bordering on the point, in seeing whether the designation of citizenship in the act of 1802 be continued in our existing statutes or not. I have preferred, considering the case, on the assumption that it is. Being of opinion, however, that, at most, the statute is but directory in this, as it is clearly in regard to the other qualifications of the recruit, it follows that Wyngall can with no more reason object his alienism as a ground for annulling his contract with the United States, than could he, if a natural born subject, his feebleness of body. The prohibition against enlisting the feeble-bodied man and the alien, is contained in the same clause, and expressed in the same form; and the consequence of each is declared to be the same. The objection that he fell below the ordinary standard in physical strength, would be looked upon as a very idle one; but it is not more so than any other claiming that the soldier is entitled to a discharge because the nation with which he dealt got the worst of the bargain.

Even were the soldier successful in combating the position that the statute is directory, and in throwing his case upon the absence of power in the immediate agent, it is still difficult to see how he can allege the nullity of his contract against the confirmation of it by the commander-in-chief.

We entertain no serious doubt that the commissioner erred; and his order discharging Wyngall must therefore be vacated.

Supreme Judicial Court, Massachusetts, March Term, (held by adjournment in July) 1843, *at Boston.*

PIERRE CHOTEAU, JR. *v.* DANIEL WEBSTER.

Two promissory notes, indorsed by the defendant, payable in New York, were protested for non-payment, and notices to the indorser were put in the post-office, directed to him at Washington, where he was residing as a senator in congress, although his domicil and place of business were in Boston. *Held*, a sufficient demand and notice.

THIS was an action of assumpsit against the defendant, who was the indorser of two promissory notes, dated at the city of New York, March 24, 1837, and payable at the Merchants Bank, in that city, on the first day of October then next, for the sum of five thousand dollars each. It was agreed by the parties, that on the last day of grace, and when the notes, according to their tenor, were payable, namely, on the fourth day of October, at or about three o'clock in the afternoon, they were delivered by the holder thereof to a notary public, residing in the city of New York, duly commissioned and qualified, for presentment, and if not paid, for protest, who straightway duly presented each of the notes to the paying teller of the said bank, and while the bank was yet open for the transaction of business, and demanded payment of the same of the teller, who refused to pay the same, for want of funds of the makers. The notes were duly protested by the notary for non-payment, and written notices, signed by the notary, of the protest of each of said notes, and that the holders looked to the indorsers for payment thereof, were put into the post-office in the city of New York, on the morning of the fifth day of the same October. The notices to the defendant, as the first indorser of each of the notes, were directed to him at Washington, in the district of Columbia. The defendant's general domicil and place of business, as a counsellor at law, was in Boston, where he had an agent, who had the charge and management of his business affairs in his absence, but, from the seventh day of September, 1837, to the sixteenth day of October following, he was at Washington attending to his duties as a senator in congress from this commonwealth, during the extra session held that year. It was also agreed, that letters from New York usually reach Washington in about forty-eight hours, by the regular course of the mail. Such letters as are addressed by mail to members of the senate, during the session of congress, are taken

from the Washington post-office by officers of the senate appointed for that purpose, or charged with the duty, and delivered to the members in their places, when the senate is actually in session, and on other days are delivered by those officers to members at their lodgings, and such was the usual course with regard to letters addressed by mail to the defendant during the extra session of September and October, 1837.

The making and indorsement of the notes, and the consideration thereof, and of the several indorsements, were admitted. All matters of fact, as well as of law, involved in the case, were submitted to the decision of the court, who were to make such inferences, from the facts stated, as a jury would have been authorized to make. If any facts were contained in the statement, which it was not competent for the plaintiff, on a trial before a jury, to prove, or put into the case, upon the defendant's objecting thereto, or which it was not competent for the defendant to prove, or put into the case, upon the plaintiff's objecting thereto, all such facts were to be stricken out by the court, and neither party was to be in any way prejudiced, by their having been inserted therein. And if, in the opinion of the court, it was necessary to the rights of either party, the case might be opened for the introduction of evidence, touching facts that might be deemed material, whether they were embraced in the statement or not. But if no farther evidence or facts should be introduced, and the court were of opinion, that the facts stated would justify a jury in finding a verdict for the plaintiff, the default was to be entered, and judgment was to be rendered thereon for the plaintiff, otherwise, the plaintiff was to become nonsuit.

The defence was placed on the ground, that the defendant was not duly and legally notified of the dishonor of the notes.

Hubbard and *Watts* for the plaintiff.

Rogers and *Healy* for the defendant.

Shaw C. J. delivered the opinion of the court, that the plaintiff was entitled to recover. From the facts agreed by the parties, the court were at liberty to infer that the notice was actually received by the defendant, and they were satisfied that such was the fact. The other question in the case was, whether this notice was sufficient to bind the defendant, or whether it ought to have been sent to him in Boston, where he had his domicil. Under the circumstances of the case, the fair inference being that notice was actually received, the court were of opinion that it was sufficient to charge the defendant.

GEORGE H. HILLS *v.* SOPHRONIA HILLS.

Where a wife separated from her husband for a justifiable cause, which had been entirely removed for six years, and the wife still refused to return, it was *held* to be a sufficient ground for a divorce *a vinculo*, under the statute of 1838, ch. 126.

THIS was the case of a libel for a divorce *a vinculo*, by George H. Hills, of Lowell, for a divorce from his wife Sophronia, (formerly Sophronia Carter, of Leominster,) on the ground of her wilful desertion of him, without his consent, for more than five years. From the evidence in the case, it appeared that the parties were married in Leominster in April, 1827, and lived together for five years. Mr. Hills having become embarrassed in his circumstances and intemperate in his habits, his wife left him and went to her friends. Mr Hills continued intemperate and poor for two or three years. He then reformed perfectly, went into business, and for six years has maintained a respectable and irreproachable character, and has had abundant means to support his wife and child in comfort. But Mrs. Hills has steadily and constantly refused to reside with him. Some of her letters were read in court in reply to his urgent requests, expressing many wishes for his welfare, but the most invincible determination never to reside with him again on any terms;[1] and she made no defence to the libel for divorce.

By the statute of 1838, chapter 126, it is provided, that a divorce from the bonds of matrimony may be decreed in favor of either party, whom the other shall have wilfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted.[2]

Theophilus Parsons for the libellant.

WILDE J., who heard the case, was of opinion, that these facts

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[1] In one of them she says: "My feelings towards you never have changed, and I know they never will change, on account of any concession or professions you can make to me. I think my course of conduct towards you would be perfectly justifiable to any reasonable person who knew the reasons of our separation. But few persons know or ever will know through me anything about it. * * * I can forgive all the injuries I received at your hands, and do most heartily, but do not think I can ever forget."

[2] The index of Dutton and Wentworth's edition of the laws of 1838, states that "divorce from *bed and board*, may be granted for five years, wilful utter desertion, without consent." Whereas the statute (page 77,) declares that a divorce *from the bond of matrimony* may be decreed in such case.

would have brought the case at once within the statute, but for the fact that the original desertion was occasioned by the fault of the husband, and was admitted to have been justifiable. The question thus raised he discussed at length and with his usual clearness, and finally decided that the intent of the law could not have been to bind a man forever for the consequences of an early fault, where that fault was one that could be cured, and where, in point of fact, there had been an absolute and entire reform. He would not undertake to speak of the motives of Mrs. Hills; but from all that appeared in the case, she seemed to be nourishing an implacable resentment, after the original grounds of offence were wholly removed. Under these circumstances he had no hesitation in decreeing a divorce from the bonds of matrimony between the parties.

THOMAS BREWER *v.* BOSTON AND WORCESTER RAIL ROAD COMPANY.

Estoppel — where the party acted under a mistake.

THIS was a writ of entry, to recover a parcel of flats on the back bay, in Boston. One of the points of defence, on which the opinion of the court was given, was founded on the fact, that in 1822 or 1823, after the water was excluded by the mill dam, the plaintiff, supposing that the line of his upland, when continued, gave the true direction of his flats, asserted his claims accordingly, caused his lines to be staked out, and gave notice to those under whom the tenants claimed, and to the tenants before the erection of their buildings and other improvements, that such was the line of his boundary. They purchased upon these lines and made their erections accordingly; and they contended that the plaintiff was *estopped* thereby from claiming his flats according to his legal rights as established in the late case of *Sparhawk* v. *Bullard*, (1 Metcalf's R. 95.)

Bartlett for the demandant.

C. P. Curtis for the defendants.

WILDE J. delivered the opinion of the court, to the effect, that the plaintiff was not so estopped, all the parties having acted in good faith, but erroneously, in regard to the legal direction of their flats as it was established by the case of *Sparhawk* v. *Bullard*.

Digest of English Cases.

EQUITY.

[Selections from 4 Beavan, part 2; 1 Younge & Collyer, parts 3 and 4; 11 Simons, part 3; 1 Turner & Phillips, part 1.]

ADMINISTRATION OF ASSETS.

(*Concurrent suits — Costs.*) Where pending an administration suit, a distinct suit is instituted by legatees for payment of their legacy, the executors ought to apply to stay proceedings in the latter suit; and they, having failed to do so in this case, the costs in the second suit, up to the coming in of the last answer, were made costs in the first suit; but the subsequent costs were thrown upon the legacies of plaintiffs in second suit. *Therry* v. *Henderson*, 1 Y. & C. 481.

2. (*Concurrent suits.*) Two decrees had been made for the administration of the estate of A. B., deceased, one in a creditor's suit, and the other in a legatee's suit. A motion, by the plaintiff in the former, to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, was refused, there being no suggestion of a deficiency of assets. *Plunkett* v. *Lewis*, 11 S. 379.

3. (*Declaration of rights without account.*) If the executors and trustees of a will file a bill for the purpose of having the rights of the defendants in the residue ascertained, without either praying that the accounts of the personal estate may be taken, or offering to account for it, but admitting that there is a residue, the Court will declare the rights of the defendants in the residue, without directing the account of the personal estate to be taken, although the defendants apply, at the hearing, to have the accounts taken. *Blathwayt* v. *Taylor*, 11 S. 455.

4. (*Indemnity to executor — Leaseholds.*) Leasehold estates of a testator were sold under a decree for carrying the trusts of the will into execution. The executor and trustee of the will had never been in possession of the estates: Held, nevertheless, that he was entitled to be indemnified in respect of the rents and covenants. *Cochrane* v. *Robinson*, 11 S. 378.

5. (*Parties — Receivers.*) A person appointed by the will receiver of the testator's real estates, with a salary, is a proper party to an administration suit. *Consett* v. *Bell*, 1 Y. & C. 569.

6. (*Payment of mortgage.*) Decreed on the authority of Scott v. Beecher, 5 Mad. 96; Lord Ilchester v. Lord Carnarvon, 1 Bea. 209; Evans v. Smithson (unreported), but against the opinion of the Court, that in administering the estate of the executor and devisee of a mortgagor, whose personal estate was not deficient, the mortgaged estate was primarily liable to the debt. *Clarendon* v. *Barham*, 1 Y. & C. 688.

ADMINISTRATION SUIT.

(*Suit by heir of mortgagor.*) In a suit for redemption by the heir of a mortgagor against the assignee of the mortgagee, who was also the personal representative of the mortgagor, the Court, besides the usual decree for redemption, declared the plaintiff entitled to have the balance which should be found due from him, and paid by him to the defendant as mortgagee, repaid to him out of personal estate of the mortgagor in a due course of administration, and decreed accordingly, the bill being properly framed with a view to such relief. *Lloyd* v. *Wait*, 1 T. & P. 61.

CHARITY.

(*Attempted extension by founder.*) By letters-patent, E. A. was empowered to found a charity, consisting of a master and a specified number of other mem-

bers, who were thereby created a corporation, with power to take certain lands, E. A. was empowered to make ordinances for the government thereof, and for the better ordering of the estates. E. A. established the charity, and conveyed the lands to the use of the master and other members, of the numbers specified by the letters-patent, and to no other intent and purpose whatsoever. He afterwards made ordinances whereby, amongst other things, he added to the number of members specified by the letters-patent; and appropriated to them a portion of the revenues of the charity property: Held, that E. A. had not the power of creating additional members, or of declaring any trust of the property in their favor. *Attorney-General* v. *Dulwich College*, 4 B. 255.

2. (*General gift for benefit of place.*) Testator gave the residue of his property "to the government of Bengal, to be applied to charitable, beneficial, and public works, at and in the city of Dacca in Bengal, for the exclusive benefit of the native inhabitants, in such manner as they and the government might regard as most conducive to that end:" Held, that this was good as a charitable bequest for the benefit of the native inhabitants, and that the funds were to be held by the governor-general as trustee in his individual capacity. *Mitford* v. *Reynolds*, 1 T. & P. 185.

COMPUTATION OF TIME.

(*Commencement of term.*) A testator directed the income of his property to be accumulated for the term of twenty-one years *from* his death. The testator died on the 5th of January, 1820: Held, that in the computation of the term, the day of his death was to be excluded; and, consequently, that the dividends on stock, which became due on the 5th of January, 1841, were subject to the trust for accumulation. *Gorst* v. *Lowndes*, 11 S. 434.

DISSENTERS.

(*Trust — Change of character.*) A lease of a meeting-house was granted, in trust for a congregation of Protestant dissenters, who then met in a house belonging to J. A., in the town of S. The congregation was then in connection with the Secession Church of *Scotland;* and, consequently, professed the same doctrines, and adopted the same form of worship, government, and discipline, as that church. Some years afterwards the minister and a large majority of the congregation separated from that connection, and joined another religious body, which professed the same doctrines, and used the same form of worship, but not the same form of government and discipline as the Secession Church: they, however, retained possession of the meeting-house: Held that, on their separation, they ceased to be objects of the trust; and, therefore, were not entitled to keep possession of the meeting-house. *Broom* v. *Summers*, 11 S. 353.

EVIDENCE.

(*Pedigree — Identity — Residence.*) An entry in an old account of burial fees, received by a sexton of a large parish, by which he charged himself with the receipt of a certain sum for the burial of one *Joseph Lloyd*, described as "in *Wells Street*," admitted as evidence that a person of that name, who was proved by the parish register of burials to have been buried there on the day on which the entry bore date, resided in *Wells Street*. *Lloyd* v. *Wait*, 1 T. & P. 61.

GAMING.

(*Money lent for the purpose of play.*) Money lent in a foreign country for the purpose of playing at games, which are not illegal in such country, may be recovered in the courts of this country; and *semble* also, that money won at play in such a country at games, or at a rate of play not illegal there, may also be recovered here. So held on appeal, reversing order of Vice-Chancellor of England. *Quarrier* v. *Colston*, 1 T. & P. 147.

HUSBAND AND WIFE.

(*Executors and administrators.*) Where property of the wife was, on the marriage, settled upon certain trusts for the benefit of the children, with power of appointment to her, in default of children, and in default of appointment, then to be paid to her *executors or administrators*, it was held, reversing the decision of the Vice-Chancellor of England, that the surviving husband was not excluded. *Daniel* v. *Dudley*, 1 T. & P. 1.

2. (*Separation — Covenant to indemnify husband.*) It is not essential to the

validity of a separation deed, that there should be a covenant by trustees of the wife to indemnify the husband against the debts of the wife; but a deed without such a covenant may take effect as a voluntary deed against the estate of deceased husband. In this case there was a trustee of the deed, but the covenant to indemnify was by the wife, and the Court treated the covenant as a nullity. *Frampton* v. *Frampton*, 4 B. 287.

3. (*Wife's chose in action.*) A woman being entitled to two sums, one secured by a mortgage in fee to herself, and the other to a trustee for her, married. The mortgagors having been applied to, but being unable to pay the sums, the trustee paid them to the husband. The husband died, leaving the mortgages untransferred. Held, that he had reduced both sums into possession. *Rees* v. *Keith*, 11 S. 388.

INJUNCTION.

(*Action at law not under direction of Court.*) A perpetual injunction was granted to restrain a tenant from removing valuable mineral deposits from the soil and banks of a pool in the course of a stream passing through lands of which he was tenant, the injunction being grounded on the verdict in an action brought by the plaintiff pending the proceedings, but not by the direction of the Court, which action turned upon the right of the tenant as such to take the mineral deposits; but in which another ground of defence which he took by his answer, namely, that he removed the soil in order to clear the stream for the purposes of a mill which he had lower down, was not put in issue. *Thomas* v. *Jones*, 1 Y. & C. 510.

JOINT STOCK COMPANY.

(*Payment of calls — Liability of trustees for company — Fraud.*) Pending a bill in parliament for forming a dock company, certain subscribers to the undertaking subscribed for 9000 additional shares, in order to make up the amount of capital required by the standing orders of the House of Lords before the bill could pass that house. Afterwards, but before the bill was passed, those persons signed a declaration that they held the additional shares in trust for the company. After the bill had passed, a meeting of the company resolved unanimously that the trust should be annulled, and the shares be transferred to the secretary, for the use of the company: no transfer, however, was made. The directors having made calls, it was held that the subscribers for the additional shares were bound, as trustees, to pay the calls in respect of those shares; but the Court did not think that the alleged fraud upon the House of Lords afforded of itself any ground for annulling the arrangement. *Preston* v. *The Grand Collier Dock Company*, 11 S. 327. (See Mangles v. Grand Collier Dock Company, 10 Sim. 519.)

2. (*Relief between shareholders — Frame of suit.*) A bill by a member of a numerous incorporated company, *on behalf of himself and all the other members*, except the defendants, praying that a transaction in which the defendants had been the actors, but which had been sanctioned unanimously at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members on whose behalf the bill was filed had been present and voted at the meeting. *S. C.*

LEASE.

(*Liability of equitable assignee — Statute of Limitations.*) A party who had become interested in a lease, first as being part of the assets of a partnership, of which he was a member, and then by an arrangement under which he received the rents of an underlease granted by the partnership, but not executed by him: Held liable, as equitable assignee in possession, for non-performance of the covenants; but that such liability, being in the nature of a simple contract, was barred under the statute of limitations by the lapse of six years. *Sanders* v. *Benson*, 4 B. 350.

PARTIES.

(*Suits by some on behalf of others.*) It is very much a question of convenience, but depending also on the nature and object of a suit, whether some or one of a very numerous class shall be allowed to sue on behalf of the whole. In this case one of twenty-six residuary legatees, being then presumptively entitled, was admitted to institute a suit on behalf of the whole, for an account of the estate and the establishment of the will, upon which there was some question

raised between the legatees and next of kin. *Harvey* v. *Harvey*, 4 B. 215.

PRACTICE.

(*Evidence — Examination of defendant.*) The plaintiffs, after filing a replication to the answer of A. B., one of the defendants, obtained an order of course to examine him as a witness, saving just exceptions: Held irregular, and the order was discharged. *Ward* v. *Ward*, 4 B. 223.

2. (*Relief between co-defendants — Costs.*) Where a decree has been had against several defendants, with costs, and one of them has been compelled to pay the whole costs, the Court will by consent decree contribution between the co-defendants, on motion in the same suit. *Pitt* v. *Bonner*, 1 Y. & C. 670.

3. (*Schedule — Bundle of documents.*) Held, that it was sufficient to set forth "three sealed hogsheads containing papers." *Christian* v. *Taylor*, 11 S. 401.

4. (*Supplement bill.*) The proper object of a supplement bill in aid of a decree is simply to carry out that decree, and if it is sought in any way to vary the decree, it is then a supplemental bill in the nature of a bill of review, and cannot be filed without leave. Accordingly where after a common decree against executors for an account, the plaintiff, without leave, filed a supplemental bill, alleging that he had discovered in the master's office that the defendants had been guilty of misconduct, and seeking relief accordingly, the Court ordered the bill to be taken off the file, though it was also a bill of revivor, and as such, might have been filed without leave. *Hodson* v. *Ball*, 1 T. & P. 177.

PRINCIPAL AND SURETY.

(*Release by variation of contract.*) A. agreed to become surety for B., for repayment of an advance to be made in the shape of a draft at three months. The advance was made by an immediate payment: Held, that the surety was discharged. *Bonser* v. *Cox*, 4 B. 379.

2. (*Same point.*) In the same A. agreed to join B. as his surety on a joint and several bond, upon receiving from him a counter bond of indemnity: the original bond was executed by A. only, and it did not appear that the obligee had taken any pains to procure its execution by B. the principal debtor. Held, that A. the surety was discharged on that ground also. *S. C.*

PRODUCTION OF DOCUMENTS.

(*Cases and opinions in other suits.*) Cases and opinions relating to litigation many years ago between the defendants and other parties, upon the subject of the claim in question in the suit, and also upon the subject of another claim resting upon similar grounds, held to be privileged. *Coombe* v. *The Corporation of London*, 1 Y. & C 631.

2. (*Documents relating to title of both parties — Pleading.*) To protect a defendant from the discovery or production of a document relating to the subject in dispute, it is not sufficient that it should be evidence of his title, or in support of his case; it must contain no matter supporting the plaintiff's title or the plaintiff's case, or impeaching the defence, and the defendant must aver by his answer, with a reasonable degree of distinctness, that the document does contain no such matter. *S. C.*

3. (*Right of defendant to production and inspection.*) The Court cannot, at the instance of the defendant, order a plaintiff to produce for the defendant's inspection documents stated in his bill to be in the plaintiff's possession. In such a case, where it is necessary for the defendant to see the documents, in order to put in his answer, the Court, though it cannot compel their production, will extend the time for answering until after the plaintiff has produced them. The fact of the documents being in the plaintiff's possession must however appear upon the record. The decision in *The Princess of Wales* v. *The Earl of Liverpool*, approved of. *Taylor* v. *Heming*, 4 B. 235.

SPECIFIC PERFORMANCE.

(*Acceptance of agreement.*) Specific performance of an agreement refused, the same not having been accepted by the plaintiff in due time, nor any acceptance by him ever notified to the defendant, and the plaintiff having, after the defendant had signed the agreement, attempted to vary the terms of it, though he ultimately acquiesced in the defendant's terms. *Thornbury* v. *Bevill*, 1 Y. & C. 554.

Digest of American Cases.

Selections from 20 Maine (2 Appleton's and 7 Shepley's) Reports. Continued from page 134.

EVIDENCE.

A witness is not protected from answering, when his answers expose him merely to pecuniary loss. *Lowney* v. *Perham*, 235.

2. A deed of a collector of taxes under which the grantee has entered and continued in possession, claiming and exercising exclusive control of the premises conveyed, is admissible in evidence to show the nature and extent of his claim, without proof that the grantor was a collector of taxes. *Boothby* v. *Hathaway*, 251.

3. The public seal of a State, affixed to the exemplification of a law, proves itself. It is a matter of notoriety, and will be taken notice of as a part of the law of nations acknowledged by all. *Robinson* v. *Gilman*, 299.

4. Although where the result will determine only which creditor of the witness will be paid, he is competent; yet where, if the party calling him shall prevail, his debt to his creditor will be paid, but if the opposing party prevail the debt to the creditor will remain unpaid, and the witness will have a claim to the same amount against an insolvent man, the interest is not balanced and he will not be a competent witness. *Danforth* v. *Roberts*, 307.

5. In an action against the acceptors upon an order drawn on them for a sum certain, to be paid "when you receive your payments from W. on his house," and accepted by the partnership name of the defendants, "to be paid as here stated;" the plaintiff must prove, to maintain his action, that one at least of the defendants accepted the order by the partnership name; that they were at that time partners in the business to which it related; and that they had received their payments from W. on his house." *Head* v. *Sleeper*, 314.

6. Where the subscribing witness to a note testifies to his own signature, but can recollect nothing more, and fails to prove its execution by the payer, other evidence of the genuineness of the signature is admissible. *Crabtree* v. *Clark*, 337.

7. If a note is partly written by one hand, and finished by another with a different ink, this does not furnish *prima facie* evidence, that the note was fraudulently altered. *Ib.*

8. The books of a person who had deceased, containing charges against the plaintiff in the action for payments made to him, the deceased not having acted as the agent or clerk of the defendant, or in his behalf, are not competent evidence for the defendant, to prove payments made by him. *McKenney* v. *Waite*, 349.

9. Although the general presumption of law is, that when the plaintiff, suing as indorsee, produces at the trial the bill indorsed, that he became the holder before it fell due; still where the defendant shows that the indorser was in possession of the bill, and claiming to own it, before and until after it became due and was protested, the presumption is so rebutted, that the admissions of the indorser are competent evidence. *Norton* v. *Heywood*, 359.

10. Where an original contract is proved to have been last seen in the hands of the party in interest in the suit, although not a party to the record, and notice to him to produce it has been given, a copy is admissible in evidence. *Ib.*

INDICTMENT.

Where a crime or misdemeanor is committed under color of corporate authority, the individuals concerned, and not the corporation should be indicted. *State* v. *Great Works M. & M. Company*, 41.

2. In an indictment for forgery, the instrument alleged to be forged, was set forth as an acquittance or discharge for the sum of forty-eight dollars. The paper forged was on its face an order for the sum of forty-eight dollars; but on its back was an order for the further sum of one dollar. It was held, that there was a variance between the allegation and the proof. *State* v. *Handy*, 81.

INDORSER OF WRIT.

To render the indorser of a writ liable for costs recovered, the original defendant must make use of reasonable diligence to collect the costs of the original plaintiff. *Wilson* v. *Chase*, 385.

2. And to show such reasonable diligence as will charge the indorser, the inability or avoidance of the original plaintiff should be shown by an officer's return thereof on an execution for costs, issued within one year from the time the judgment was rendered. Parol evidence is inadmissible to supply the omission. *Ib.*

LEVY ON LAND.

Where an agreement was made between the plaintiff and one of the debtors in a suit, who was surety for the principal debtor, that the plaintiff should proceed to judgment and then levy on the land of the principal debtor and that after such levy, the surety was to purchase the land thus obtained of the creditor in the execution, and security was given for the performance of this agreement; *it was held*, that this did not amount to a payment of the execution by the surety and that consequently the levy was good. *Nickerson* v. *Whittier*, 223.

2. The appraisers, chosen to appraise the value of real estate, should be residents of the county where the appraisal is to be made. *Ib.*

3. The officer is required by law to notify the debtor, if he live in the county in which such appraisal is to be made, and if not, the officer should return such fact, which will justify his appointment of an appraiser for the debtor, without notice to him. *Ib.*

4. When an execution is legally levied, and recorded, on land liable to be taken, and the proceedings are duly returned, the creditor is considered as having the actual seizin and possession. *Ib.*

LIBEL.

Two articles not simultaneously published in the same paper or book cannot be coupled together for the purpose of ascertaining whether one of them is libellous or not. *Usher* v. *Severance*, 9.

2. In a libel the charge of larceny being made, malice is by law implied and it is for the defendant to disprove it. *Ib.*

3. The presumption of malice, arising from the publication of the charge, is not rebutted by proof that the publisher had reason to suspect and believe the truth of the charges made. *Ib.*

4. In every case it is the province of the jury, under the instruction of the Court, to determine the import of the language used, whether it be libellous or not *Ib.*

5. The editor of a newspaper has a right to publish the fact that an individual is arrested, and upon what charge, but he has no right, while the charge is in the course of investigation before the magistrate, to assume that the person accused is guilty, or to hold him out to the world as such. *Ib.*

MORTGAGE.

The mortgagor is seized of an estate of freehold, and while in possession may convey the mortgaged premises, or may bequeath them as and for dower, or they may be assigned by the judge of probate, and the dowress may enter under such assignment, and hold the same and redeem the mortgaged premises. *Wilkins* v. *French*, 111.

2. The widow, by virtue of such assignment, has the right in equity during her life, and the reversion remains in the heirs at law, and in such case, either may redeem. *Ib.*

3. If the heir at law or his assignee redeem, he may oust the widow, unless she should redeem by paying such sum as he may have paid for redemption, in which case she and her heirs would hold till the amount paid by her should be refunded. *Ib.*

4. A mortgage is a mere charge upon the land mortgaged, and whatever will give the money will carry the estate in the land along with it. *Ib.*

5. The mortgage being only security for the debt, the mortgagor has all the rights he ever had against all but the mortgagee. *Ib.*

6. One co-tenant, holding a mortgage on the part of the other, united with him in a deed of the land of which they are co-tenants, by which the several portions of each are conveyed, and in which the premises conveyed are said to be "free from incumbrances," and "that the grantors have good right to sell and convey," without causing any exception to be made of his own title as mortgagee, and without disclosing its existence to the purchaser. He is estopped by the declarations of his mortgagor in their deed to claim under his mortgage. *Durham* v. *Alden*, 228.

7. To permit him to disturb a title thus acquired, would be a fraud upon the purchaser. *Ib.*

8. Where an equity of redemption is attached, the debtor may lawfully remain passive, and suffer the mortgage to become foreclosed, and may even persuade another creditor to take his interest as security and assign it to him, and if such other creditor should so take it such arrangement is not a fraud upon the attaching creditor, although the assignee knew of the existence of the attachment. *Danforth* v. *Roberts*, 307.

9. Nor is it a fraud upon the attaching creditor, if the assignee make an agreement with the mortgagee, that the latter shall hold the mortgage until the time for redemption has expired, and then convey the land to the assignee on being paid by him the amount secured by the mortgage. *Ib.*

10. If the statement of the mortgagee to the mortgagor, made one month prior to the time when an entry to foreclose the mortgage would become perfected, that "he would give him some time, but that he must not wait long, as he might take advantage of the mortgage," be binding on a grantee or assignee of the mortgagee without notice of such statement, yet the right of redemption no longer remains, where five years have expired, and no payment, or offer of payment, has been made to the mortgagee or his assignee. *Ib.*

11. If the grantee of the mortgagee, is proved to have been in possession of some land not included in the mortgage, to which the plaintiff in equity shows a title, the bill cannot be supported thereby, because the plaintiff has a full and adequate remedy at law. *Ib.*

12. A contract, free from actual fraud, where the owner of a stock of goods mortgages them to secure the plaintiffs against certain liabilities on certain notes, assumed for him as his sureties, containing a stipulation that the mortgagor should retain the possession of the goods until default should be made in the payment of the notes, or some of them, and "should pay over and account for the proceeds of all sales of said goods to the mortgagees, to be applied in payment of said notes, or directly to apply said proceeds to the payment of said notes, at the discretion of the mortgagees" is a lawful contract. *Abbott* v. *Goodwin*, 408.

13. All persons coming in under the mortgagor, stand by substitution in his place, and are equally affected by the contract, whether notified of its existence or not. *Ib.*

14. The power of the mortgagor to make sale of the goods may be implied from his covenant to account to the mortgagees for the proceeds of the sales. *Ib.*

15. If the mortgagor sell the goods, and with the proceeds thereof purchase other goods, these last represent the first, and are substituted for them, and are equally subject to the lien of the mortgagees thereon. So if the mortgagor exchange the goods mortgaged for other goods, and the mortgagees choose to ratify it, the goods received in exchange are equally subject to their lien. *Ib.*

OFFICER.

In case of a demand seasonably made by an officer having an execution, upon the officer by whom the attachment on the original writ was made upon which such execution issued, where the property attached is bulky and is deposited in a suitable and convenient place for safe keeping, and the officer upon whom the demand is made is ready and willing to deliver the property attached at the place of its deposit, so that it may be taken on execution, and offers so to do, and is prevented from delivering the same by the failure of the officer making the demand to go with him and receive it, he is discharged. *Gordon* v. *Wilkins*, 134.

2. It is otherwise, if the property be at an inconvenient and unreasonable place of deposit. *Ib.*

3. A demand made by the officer

having the execution, upon the officer by whom the attachment was made, on the last day of the continuance of the lien created by the attachment, will be presumed to have been in sufficient season on that day to enable the officer by whom the attachment was made, to discharge himself. *Ib.*

4. The return of the fact on the execution issued upon the judgment, is *prima facie* evidence of a demand for the property upon the attaching officer. *Hapgood* v. *Hill*, 372.

5. A demand, in whatever words made, which would inform the attaching officer, that the sheriff having the execution desired to obtain from him the property attached, would be sufficient. *Ib.*

6. If the defendant in an action of *scire facias* against him as bail, before a justice of the peace, procures a constable to attend the Court to receive the principal on being surrendered by the bail, and the service is performed by the constable, this is sufficient to enable him to recover of the bail the fees to which he was by law entitled. *Thompson* v. *Wiley*, 479.

7. And if the mitimus be dated on the twentieth day of the month, and the return of the commitment by the constable be dated on the twenty-second, if any impropriety exists on the part of the officer in detaining the principal, the party injured thereby only can complain, and it will not deprive the officer of his right to recover his legal fees of the person who employed him. *Ib.*

PARTNERSHIP.

The interest of each partner in the partnership property is his portion of the *residuum* after all the debts and liabilities of the firm are liquidated and discharged. *Douglas* v. *Winslow*, 89.

2. A creditor of one of the firm may attach their goods so far as his debtor has an interest in them, subject to the paramount claims of the creditors of the firm. *Ib.*

PRACTICE.

A verdict will not be set aside because the verdict of a former jury was delivered them, with the papers in the case, unless fraudulently or designedly done with intent to influence them. *Harriman* v. *Wilkins*, 93.

2. When the statute gives double damages, they may be assessed either by the Court or the jury, and it is immaterial by which. *Quimby* v. *Carter*, 118.

3. If the legal cause for taking a deposition no longer exists at the time of trial, the proof to exclude it is to come from the adverse party. *Logan* v. *Munroe*, 257.

4. When the jury *may find* from the evidence, however improbable it may be that they will do so, the state of facts to be such as is contended for; the Court cannot restrain counsel, when arguing upon such a possible result. But in such a case, it will be proper for the Court to call the attention of the jury to the amount of evidence upon which such arguments are built. *Ib.*

5. But where facts have been stated by a witness, which could be legal evidence only by a proof of having been brought to the knowledge of the adverse party, and there has been an entire failure of proof on the latter point, the commentaries of counsel thereon as evidence in the case would be improper. *Ib.*

6. The Court may according to our practice order a nonsuit, when the testimony introduced by the plaintiff will not authorize the jury to find a verdict in his favor. *Head* v. *Sleeper*, 314.

7. Where a note appears from inspection to have been altered, and the jury are of opinion, that the alteration was made after the execution of the note, it will be their duty to return their verdict for the defendant. But whether altered subsequently, or not, is a question for them, if no explanatory testimony is adduced. They are not to be instructed as matter of law, that if not accounted for by the plaintiff, the note is void. *Crabtree* v. *Clark*, 337.

8. Where a witness testifies to certain acts of the party, and states certain words spoken by him, and then states what he understood by the words spoken, and where the words spoken would not warrant the conclusion drawn by the witness, but the acts and words spoken, taken together, would justify it, and the verdict of the jury was in accordance with it; although the *opinion* of the witness was inadmissible, and ought to have been excluded, yet as the verdict was sustained by the evidence, the Court will not set it aside. *McKenney* v. *Waite*, 349.

PRINCIPAL AND SURETY.

Where notes are signed by three persons for a joint debt, each is a principal for one-third, and a co-surety for the other two-thirds. *Goodall* v. *Wentworth*, 322.

2. If one pays another's share of the notes, after they become payable, he has a legal claim upon the third for contribution. *Ib.*

3. And if the third party voluntarily pays the one half in pursuance of such legal obligation, the law raises an implied promise on the part of him for whose benefit the notes were paid, to refund the same. *Ib.*

4. It is not essential to the support of such action, to prove an inability of the principal at the time they were paid, to pay his share of the notes. *Ib.*

RECEIPTER.

Where property has been attached, and a receipt therefor has been given to the attaching officer by the defendant and another, whereby they promise to pay a sum of money, or safely to keep the property free of expense to the officer, and on demand to redeliver the same to him, or his successor in office,—and if no demand is made, that they will, within thirty days from the rendition of judgment in the suit, redeliver the property at a place named, and notify the officer of the delivery,—such contract is not illegal. *Shaw* v. *Laughton*, 266.

2. To maintain an action on the contract after the expiration of the thirty days, it is not necessary for the officer to prove a demand of the property, nor notice to the receipters of the time when judgment was rendered. *Ib.*

3. But the receipters are not to be held liable for the value of a horse, part of the property, which died before the time limited for the delivery, without fault on their part. *Ib.*

REPLEVIN.

The plaintiff in replevin is not a trespasser in taking the goods replevied, if he offer sureties satisfactory to the officer, though in fact insufficient. *Harriman* v. *Wilkins*, 93.

2. If a deputy sheriff takes an insufficient bond in replevin, he is guilty of official misconduct, for which the sheriff is responsible. *Ib.*

3. The officer being required in replevin to take a bond "with sufficient surety or sureties," is not justified if he take insufficient sureties by showing that the plaintiff in replevin was a person of abundant property. *Ib.*

4. The statute of limitations against the sheriff for taking insufficient sureties in replevin, commences running from the time when the plaintiff in replevin, after judgment for a return, has failed to return upon demand the property replevied. *Ib.*

5. The mere taking by one man of the mill logs of another and mixing them with his own, will not constitute confusion of goods; but if he fraudulently takes the logs and manufactures them into boards and intermixes those boards with a pile of his own, so that they cannot be distinguished, with the fraudulent intent of thereby depriving the plaintiff of his property, the *owner of the logs* thus taken may maintain replevin for the *whole pile of boards*. *Wingate* v. *Smith*, 287.

6. Although the owner may claim his property after it has undergone a material change, yet if he would replevy it, he should describe it as it existed at the time of the commencement of his suit. If mill logs be fraudulently converted into boards before the writ of replevin is sued out, the owner should describe the property as boards in his writ. He cannot describe it as mill logs, and recover boards. *Ib.*

7. It is a good defence, in an action of replevin, *under the general issue*, that the writ was sued out before the cause of action accrued. *Ib.*

SEIZIN AND DISSEIZIN.

The fact of seizin is shown by proof of a conveyance to an ancestor of the demandant from one seized, and entry under such deed, and a descent cast; and to impeach such a title on the ground that the conveyance was made to defraud creditors, the tenant must show it fraudulent, that the creditors have by some act avoided the same, and that he is entitled to set up their title against the demandant or those from whom he derived his title. *Delesdernier* v. *Mowry*, 150.

2. An entry under a deed from one having no title, is evidence of a seizin arising by disseizin. *Boothby* v. *Hathaway*, 251.

3. A seizin in fact in the grantor, un-

der color of, though without legal title, is a defence to a suit for a breach of the covenants of seizin. *Ib.*

SHIPPING.

The mortgagee of a ship, though the register or enrolment of the vessel stand in his name, if he has not taken the actual possession and control of the vessel mortgaged, is not answerable for supplies furnished by order of the mortgagor or by the master acting under his order. *Cutler* v. *Thurlo*, 213.

2. So in case of a contract of sale, where the general owner agrees upon certain contingencies to convey the vessel to one, who takes the whole control of the same with a right to appropriate its earnings to his own use, such owner is not responsible for supplies furnished under the direction of the expected purchaser. *Ib.*

3. The hirer of a chattel cannot without special authority for the purpose, create a liability of the owner for the costs of repairs or supplies furnished by direction of the hirer and to aid him in deriving advantage from the thing hired:—and this principle applies equally to a vessel as to any other chattel. *Ib.*

4. Nor is this rule of law varied by the fact that the supplies were furnished with the expectation, that the owner was liable, and on his credit. He is not responsible except for supplies furnished by his consent personally, or that of his lawfully authorized agent. *Ib.*

STATUTE OF LIMITATIONS.

Payment of part of a debt, liquidated and ascertained by a contract, is an admission that the whole was then due. *Haven* v. *Hathaway*, 345.

2. An indorsement on a note by the holder *after the statute might operate*, affords no satisfactory evidence of such admission. *Ib.*

3. In an action upon a note payable more than six years before the commencement of the suit, it was held, that where the defendant had delivered another note to the plaintiff "to collect the same, and apply the proceeds to the payment" of the note in suit, and the plaintiff had accepted it, that he was bound to comply with these directions; and that as soon as he collected money upon it he was obliged to consider it a payment of so much on the note in suit; and that proof of a payment on the collateral note would operate as proof of payment of the same sum on the note in suit *Ib.*

4. But in such case, if the plaintiff has not used that reasonable diligence which the law requires to collect the collateral note, and the payments have been made later than they should have been, they cannot be considered as made by order of the defendant; otherwise they will be so considered. *Ib.*

TENANT AT WILL.

Where the grantor remains after the conveyance in possession of the premises conveyed, the presumption of law is that he is there rightfully, and as the tenant of the grantee. *Sherburne* v. *Jones*, 70.

2. In the case of a tenancy at will the crops belong to the tenant. *Ib.*

TROVER.

Where the plaintiff delivered his horse to another to be kept until a note given for the price became due or was previously paid, and before the time of payment the horse was sold to the defendant by the bailee without notice of the plaintiff's claim, and the defendant, after having had notice of the plaintiff's rights, continued to use and claim the horse as his own after the time limited for the payment of the note had expired without payment; this amounts to a conversion, and the plaintiff may maintain trover without a demand of the horse. *Porter* v. *Foster*, 391.

2. The neglect of a party to proceed against one who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitation interposes. *Ib.*

3. A judgment in trover without satisfaction against one trespasser, is no bar to an action against another person for a distinct trespass upon the same property, committed at a different period and not jointly, although a writ of execution may have issued upon the judgment. *Hopkins* v. *Hersey*, 449.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NEW BRUNSWICK, WITH TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS. By DAVID SHANK KERR, Esq., Barrister at Law. Vol. I. Saint John, N. B. Printed by W. L. Avery; Brunswick Press, Prince William street. 1843.

This is an interesting volume of colonial reports. The paper, the type, the opinions of the court, the labors of the reporter, all bear the impress of an *English colony*. The most hasty glance suffices to satisfy the mind, that this volume is neither the ripened product of Westminster Hall, or of the press of London, nor again can it be confounded with the multitudinous reports, the offspring and spawn of the jurisprudence of the United States. In all respects it surpasses the single volume of decisions in Newfoundland, a collection of cases as rough and shaggy as one of the dogs of the Island, and, we may add, viewing the land and water topics, as amphibious too. It more strictly belongs to the common law, than the volumes of Canada reports, which present a medley, a sort of *tertium quid*, from the French and English jurisprudence, where the *Coutumes de Paris*, and the commentaries of Lord Coke, are of equal authority.

The jurisprudence of New Brunswick seems to be purely that of the common law, altered and qualified only by local legislation. No foreign stream has mingled with the waters which flow from the fountains of Westminster Hall. The judges and lawyers appear to be trained in the niceties and technicalities of the ancient law. They certainly would not be found wanting, if to them were applied the pedantic test of the Lord Keeper Guilford, according to his amusing biographer, Roger North, who said of a lawyer — that he ought to be a good "*put-case*." The old writers are referred to with familiarity, and the dark pages of the year books, are made to send forth gleams for the illumination of the path of the Colonial court. From other opportunities than these reports, we are induced to believe, that New Brunswick may boast of many lawyers of extensive and accurate learning in the more technical parts of law. We cannot easily forget an argument, or essay, which we once read on a difficult question of replevin — a title, which carries us back to the early sources of the English law — by Mr. Justice Parker, one of the ornaments of the bench in this province, whose opinions may be found in this volume. And in various ways, we have had occasion to know the careful learning, the discriminating sense and calm judgment, which distinguish Mr. Chief Justice Chipman.

It would be unjust to Mr. Berton, the predecessor of Mr. Kerr, to compare the labors of the two reporters. The latter succeeded to the duties which he now discharges so honorably, on the death of Mr. Berton. It seems that he was appointed by his excellency, the lieutenant governor of the province, on the recommendation of the judges, in pursuance of an act, "for publishing the decisions of the supreme court," 6 Wm. IV. chap. 14. Mr. Kerr has thought it proper to introduce his volume by a preface of considerable length, in which he vindicates the importance of reports, adopting as many heads for his discourse, as would satisfy a preacher of the old school. He reaches as far as *tenthly*. It may be that this will be of

high value in the province; but we confess, that considering the necessity of judicial reports as unanswerably established, by the experience of centuries, beyond even the hardy cavils of our day, we are disposed to address the reporter in the language once used to the most witty and acute of lawyers—"*Saunders, why do you labor your cause so much?*"

The number of arguments by the reporter himself, shows that he has the confidence of clients, as well as of the court; and we are happy in bearing an humble testimony to the learning and accuracy of his labors. Lord Coke tells us that Moses was the first reporter. Into the long array, beginning in sacred antiquity and stretching on through the volumes of Metcalf and Peters, even "to the crack of doom," we welcome our provincial brother.

American Law Magazine. Vol. I. April and July, 1843. Philadelphia: T. & J. W. Johnson, Law Booksellers.

Most of our readers are probably aware that the American Jurist, which has been published in Boston for more than ten years, has been discontinued. The present work has been since established in Philadelphia, and appears to be upon the general plan of the American Jurist. It is beautifully printed; the articles are varied and well written; the Digests of English and American Cases are very full, and although it does not appear who are the editors, it is stated that the "editorial department is confided to the hands of gentlemen of undoubled ability and industry, who will be aided by contributions from many of the leading jurists of the country."

NEW AMERICAN PUBLICATIONS.

Reports of Cases argued and determined in the Supreme Court of Law and Equity of the State of Arkansas. By Albert Pike, Counsellor at Law. Vol. 4. Little Rock. 1843.

The Equity Draftsman, being a selection of Forms of Pleading in suits in Equity. Originally compiled by F. M. Van Heythusen, Esq., Barrister at Law. Revised and enlarged with numerous additional Forms and practical notes. By Edward Hughes, Esq., of Lincoln's Inn, Barrister at Law. Third American from the last London edition. New York: John S. Voorhies. 1842.

Reports of Cases argued and determined in the Supreme Court of Errors of the State of Connecticut, prepared and published in pursuance of a statute law of the State. By Thomas Day. Vol. 15—Part 1, (or Vol. 10—Part 1, New Series.) Hartford. 1843.

Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Frederick Watts and Henry J. Sergeant. Vol. 4. Containing the Cases decided in part of July Term, in September Term, and part of December Term, 1842. Philadelphia: James Kay, Jr. and Brother. 1843.

A Treatise on the Law of Private Corporations aggregate. By Joseph K. Angell and Samuel Ames. Second edition: revised, corrected, and enlarged. Boston: C. C. Little and J. Brown. 1843.

Reports of Cases argued and determined in the Supreme Court of the State of Ohio in Bank. By Edwin M. Stanton, Reporter. Vol. 11. Printed by authority of the General Assembly. Columbus. 1843.

Reports of Cases argued and determined in the Court of Chancery of the State of New York. By Alonzo C. Paige, Counsellor at Law. Vol. 9. New York: Gould, Banks & Co. 1843.

Intelligence and Miscellany.

TRIBUTE TO MR. LEGARÉ.

At his customary lecture on the Constitution of the United States, to the students of Dane Law College, on Thursday, the 22d of June, Mr. Justice Story made the following remarks upon the character of Mr. Legaré. They were taken down by a gentleman present, and have been published under the sanction of the learned Judge:

When I last met you, I little anticipated the calamitous event, which has since occurred, in the death of a distinguished man who expired in the city of Boston on Tuesday morning last. Whoever considers the principles of the Constitution can never forget *him;* for he was firm and true to its doctrines, and exhibited that elevated and comprehensive statesmanship, which the constitution demands of its real friends. I refer, of course, to Mr. Legaré, the late attorney general, with whom I had the happiness to be intimately acquainted; whom I knew not only as an accomplished gentleman, but also as a great lawyer. I speak of him to you here, not merely to pay a deserved tribute to his worth, but because I know of no man whom I would sooner propound as an example, to young men entering the profession, which he has so much adorned. I had indeed looked to him with great fondness of expectation. I had looked to see him accomplish what he was so well fitted to do, what, I know, was the darling object of his pure ambition — to engraft the Civil Law upon the jurisprudence of this country, and thereby to expand the Common Law to greater usefulness and a wider adaptation to the progress of society.

Mr. Legaré was a native of South Carolina, and was graduated, I understand, at an early age, at Columbia College. He proceeded, soon after he left that institution to Edinburgh, where he devoted himself, with great diligence and intensity of study, to general and classical literature. He then went to the Continent and pursued the study of the Civil Law with great assiduity and success, and afterwards returned to South Carolina to practise, and became soon eminent at the bar of that state.

It is a most singular circumstance, that eminence in general literature should, in the public mind, detract from a man's reputation as a lawyer. It is an unworthy prejudice, for certainly the science of jurisprudence may borrow aid as well as receive ornament from the cultivation of all the other branches of human knowledge. But the prejudice exists: — and yet one would think that the public had witnessed so many examples of men who were great scholars and great lawyers likewise, that the prejudice might be at this day disarmed of so much of its quality, as is apt to do injustice to the reputation of living men. Lord Mansfield was a most eminent scholar in general letters; but he was also unsurpassed in jurisprudence. Sir William Blackstone was so elegant a scholar, that his Commentaries are models of pure English prose; but they are none the less the invaluable mine of the Laws of England. Lord Stowell, the friend and executor of Dr. Johnson, was in various attainments exceeded by few; but his knowledge of general jurisprudence was greater than that of any man of his day. Some of the proudest names now on the English benches are some of England's best scholars. But there as well as here — though certainly it is far greater here — the public prejudice almost denies to a great scholar the right to be eminent as a jurist. Dr. Johnson has said —

> And mark what ills the scholar's life assail,
> Toil, envy, want, the patron and the gaol.

None of these were the evils of our friend. His only evil was, that his reputation as a lawyer was sometimes underrated, because of his great general attainments. But nothing could be more

unfounded than this idea. He considered the law as his pursuit; as his object; as the field of his ambition. Fifteen years ago, I knew him as an eminent lawyer. He afterwards went abroad in a diplomatic capacity; and, at Brussels, where he resided, devoted himself anew to the study of the Civil Law, with a view to make it subservient to the great object of his life, the expansion of the Common Law, and the forcing into it the enlarged and liberal principles and just morality of the Roman jurisprudence. This object he seemed about to accomplish; for his arguments before the Supreme Court were crowded with the principles of the Roman law wrought into the texture of the Common Law with great success. In every sentence that I heard, I was struck with this union of the two systems. At the same time, the whole was wrought in a style beautiful, and chaste, but never passing from the line of the argument, nor losing sight of the cause. His argumentation was marked by the closest logic; at the same time he had a *presence* in speaking, which I have never seen excelled. He had a warm, rich style, but he had no declamation; for he knew that declamation belongs neither to the jurist nor to the scholar.

It was only during the last summer, that he wrote to me that he intended to translate Heineccius's Elements; for he wished, he said, to *entice* the American lawyer to the study of the Civil Law. He added, that he had nothing to gain by undertaking such a work, but that he would undergo the labor as a homage to his country. Knowing his eminent qualifications for the task, I advised him to make the translation, and to add to it notes of his own, so as to adapt the principles to the existing state of the Common Law; telling him that he would thereby confer a benefit on his country which no man of the age would be likely to exceed.

A few years since, he published a paper in the New York Review, on the Origin, History and Influence of Roman Legislation, and afterwards printed it separately from the Review itself. Whoever reads that essay — and I hope you will all read it — will perceive his vast attainments in the Civil Law. You, who have not heard him, cannot judge of his attainments in the Common Law; but I, who heard his arguments, know that he devoted himself to the Common Law with a wise perception of its defects, and a purpose to ameliorate them with the riches of the Civil Law; and I may say of him, having seen his mastery of both systems of jurisprudence — that he walked with them triumphantly, the one in one hand, and the other in the other hand, in the path of a great jurist.

Although he might have had other places in the gift of the government — as I have been told — yet he desired only the office of attorney general, and he desired that for the sake of the law. When, therefore, the question is asked, was he eminent as a lawyer? I answer; no man more so. Do you ask what was the secret of his eminence? I answer, it was diligence, profound study, and withholding his mind from the political excitements of the day.

To me, his loss is irreparable. How few do I see around me, of severe studies in jurisprudence; willing to devote their days and nights to the mastery and improvement of it as a great science; and looking for the fame that comes of devotion like his. Such study is not fanned by the breath of popular applause, and so it is rare. But in him it shone most brilliantly. I pronounce him a great loss, as one of the most valuable lights of jurisprudence that it has been my happiness to know; my misfortune to lose.

It was but the day before yesterday — and before I had heard of his death, the news of which met me as I was going from my own house — that I had taken down *Cicero de Claris Oratoribus*, and had turned to the passage where he begins —

"As I was leaving Cilicia to go to Rhodes, I heard of the death of Hortensius." Hortensius, the great Roman lawyer, so much and so justly praised by Cicero, died, as we are told, when his usefulness had been completed. How different from him, who has been taken from us, when we had just learned to appreciate his inestimable value to the jurisprudence of the country. To Cethegus, another orator, Cicero applies the remark of Ennius,

Is dictus ollis popularibus olim,
Qui tum vivebant homines, atque ævum agitabant,
Flos delibatus populi.[1]

I say of the Attorney General, NOT *delibatus populi;* I say of him, *Flos delibatus juris.*[2]

As I looked a little farther, I came upon the passage, which, by a striking

[1] He who was called by the men of other times, then upon the stage, the chosen flower of the people.

[2] I say of the Attorney General, NOT *chosen of the people* — I say of him, *the chosen flower of the Law.*

coincidence, expressed what has since been realized to my own feelings, as the full influence of such a life; a life, the only deep lamentation for which is, that he had had so little time to make himself fully appreciated by the whole Republic. I give you the English first, that I may afterwards give you the more beautiful Latin. "They therefore seem to me to have lived both fortunately and happy, not only in other states, but especially in ours, who have been permitted not merely to enjoy authority and the renown of action, but also to attain the praise of wisdom; whose memory and reputation, in our gravest and severest cares, have been truly grateful, whenever in history we have fallen upon them."[1]

I dismiss the subject, with the remark, that the constitution has lost one of its best friends; the supreme court one of its brightest ornaments; the country an inestimable man, whose independence, whose public virtue, whose rare endowments, and whose freedom from all the arts of popularity gave full assurance of a life of the highest value to the state. To me, had my own career closed before his, a single word of praise from his lips, could I have looked back to know it, would have been as valuable a tribute as from any other human being.

The following letter from an esteemed correspondent may not be regarded as an inappropriate conclusion of this beautiful tribute to Mr. Legaré:

WASHINGTON, JULY 12th, 1843.

To the Editor of the Law Reporter.

A recent number of "The National Intelligencer" contained the elegant tribute to the character and learning of the late Attorney General of the United States, which Mr. Justice Story introduced in a lecture to the students at Dane Law College. The closing sentence is felicitously expressed. "To me, had my own career closed before his, a single word of praise from his lips, could I have looked back to know it, would have been as valuable as from any other human being."

The elaborate essay by Mr. Legaré, "On the origin, history, and influence of Roman Legislation," contains evidence that his *pen* was not silent as to the accomplishments of the learned Judge. It is in my power to testify, that his *lips* were eloquent in his praise. During a conversation with Mr. Legaré, not long since, he remarked, "What a wonderful man is Judge Story! his labors and his services have been immense; he is the greatest living lawyer; he is not old; ten years more of life would be of inestimable value to the country."

The conversation was interesting, and certain portions I have already communicated to another person, to whom Mr. Legaré alluded in terms of approbation. His language made a strong impression upon me, not only from its truthfulness, but from the fervent and heartfelt manner in which he poured forth his thoughts, at a time when he was evidently not contemplating the rapid termination of his *own* career. His commendation will lose much of its value, if I am to remain the sole depositary of it. I hope it is worthy of diffusion through the medium of the Law Reporter. It is no infirmity for one as distinguished as the author of "Commentaries on the Conflict of Laws" to value the praise of honorable men. Cicero commends a passage in the play of Hector, by Cneus Nævis, an early author, where the hero, delighted with the praises of his father Priam, exclaims —

Lætus sum
Laudari me abs te, pater, laudato viro.[1]
Tuscul. Disput. Lib. 4, *c.* 31.

I had the high privilege of meeting Mr. Legaré almost daily, while he was Attorney General, and I noticed with admiration his refined taste, industry, and habits of research, not merely in the chosen fields of the Civil, but in the very thorniest by-ways of the Common Law. During his last legal investigation, I handed to him, at his request, a volume of the old edition of Croke's Reports; after the intelligence of his death reached me, I entered his office, and found the volume spread upon his table, as he left it. There was sadness in its antique and sombre type.

The application, by Judge Story, of the happy and poetic expression, "flos delibatus juris," reminds me of the language of Macauley, in reference to Milton, which is equally appropriate to Mr. Legaré: "His thoughts resemble those celestial fruits and flowers which the Virgin Martyr of Massinger sent down from the gardens of Paradise to the earth, distinguished from the productions of

[1] Itaque ii mihi videntur fortunate beateque vixisse, cum in cæteris civitatibus, tum maxime in nostra, quibus cum auctoritate, rerumque gestarum gloria, tum etiam sapientiæ laude perfrui licuit. Quorum memoria et recordatio in maximis nostris gravissimisque curis jucunda sane fuit, cum in eam nuper ex sermone quodam incidissemus. — [Cic. de Clar. Orat. 2.

[1] "My spirits, Sire, are raised,
Thus to be praised by one the world has praised."

other soils, not only by their superior bloom and sweetness, but by their miraculous efficiency to invigorate and to heal. They are powerful, not only to delight, but to elevate and purify."

Case of the Somers. — The last number of the North American Review, for July, 1843, contains an elaborate article on this most interesting case, by Charles Sumner, Esquire, of Boston, which has justly made a strong impression on the community. In our apprehension, Mr. Sumner has here given the most complete review of the tragedy on board the Somers that has yet appeared; and he has succeeded, with equal skill and ability, in elucidating some points in the case of an entirely new aspect. The article also contains a most interesting historical account of mutinies in men-of-war, wherein the writer places in prominence the heinous nature of this species of treason, and shows conclusively that successful mutinies have always been the result of most secret operations; that they have been entirely unlooked for and unexpected by the victims, and are often the offspring of petty causes; sometimes, as in the case of the Bounty, assuming an instant strength, and overwhelming with destruction the wholesome authority of the ship, as, without any warning, the hot lava descends the mountain side, carrying with it destruction and death.

From this historical view, the writer draws the obvious lesson, that the commander cannot be too wakeful in his care to preserve his ship,—and that his duty to the flag under which he sails, and to the crew that remain loyal, may impose upon him stern necessities which would not arise in the peaceful course of an ordinary voyage.

In regard to the case of the Somers, the writer develops a new and most important consideration as to the true ground of commander Mackenzie's defence, showing that the learned counsel of the accused unnecessarily abandoned the strongest position in the case, and, "with the gallantry of another profession, threw away a shield to which their client was entitled." The learned counsel, it will be recollected, based their defence of the execution on the ground, that a mutinous conspiracy in fact existed on board the Somers, and the persons executed were parties to that conspiracy. But the writer, in a powerful argument, shows conclusively, that in this they assumed too great a burden, and demonstrates that the justification of the commander is complete if there was an APPARENT necessity for a resort to *extraordinary* means to arrest the mutiny. Undoubtedly, this is the true ground, and if made out, the commander having acted in good faith, the justification is complete, whether the parties executed were actually guilty or not. It is obvious, that this position places the case of the commander on altogether higher ground than his counsel placed it, and narrows the defence to a single point — namely, the *apparent necessity*, and *good faith in the commander;* and this the writer has considered with the clearness and ability that characterize the whole of the article.

Upon the whole, we repeat, that this article is the most complete and satisfactory view of this most interesting case that has yet appeared. It is also characterized by great fairness and impartiality. We rejoice that the singular, undignified, and improper interference of Mr. Secretary Spencer is placed in its true light; and still more, that the extraordinary despatch of commander Mackenzie is spoken of with the severity it deserves.

The Dunham Divorce Cases. — In our last number we gave a somewhat extended account of the opposing divorce cases, brought by Thomas H. Dunham and his wife Eliza A. Dunham, both of South Boston. Since then, the Supreme Judicial Court has decreed to Mrs. Dunham a divorce from bed and board, on account of bad treatment and neglect on the part of her husband. The court also allowed to her $5 per week for alimony, and gave to her the custody of the two children, which are to remain with her until otherwise ordered by the court. Thus has she prevailed in every respect over her husband, in this court. But her friends do not appear to have been satisfied with this amount of triumph, for at the last term of the grand jury for the municipal court, Dr. Marcellus Bowen obtained an indictment against Abigail Bell, the principal witness in the case of T. H. Dunham against his wife, for perjury, and the case stands continued till the August term for trial.

Law and Lawyers. — We make the following extract from the admirable little work of Jacob Abbott, entitled Marco Paul's Adventures in Pursuit of Knowledge. Although intended for the young, we think this extract, at least, might be useful to some children of a larger growth. Forester is giving an account of the growth of a village:

"After a while a physician comes and settles there, to heal them when they are sick, and a lawyer, to prevent disputes.

'To *prevent* disputes!' said Marco. Marco had not much idea of the nature of a lawyer's business, but he had a sort of undefined and vague notion, that lawyers *made* disputes among men, and lived by them.

'Why, I know,' said Forester, laughing, 'that lawyers have not the credit, generally, of preventing many disputes, but I believe they do. Perhaps it is because I am going to be a lawyer myself. But I really believe that lawyers prevent ten disputes, where they occasion one.'

'How do they do it?' asked Marco.

'Why, they make contracts, and draw up writings, and teach men to be clear and distinct in their engagements and bargains. Then, besides, when men will not pay their debts, they compel them to do it, by legal process. And there are a vast many debts which are paid, for fear of this legal process, which would not have been paid without it. Thus, knowing that the lawyers are always ready to apply the laws, men are much more careful not to break them, than they otherwise would be. So that it is no doubt vastly for the benefit of a community, not only to have efficient laws, but efficient lawyers to aid in the execution of them.'"

ADVERTISEMENT. — The following advertisement, in a Portland paper, we copy without charge. The Cumberland bar, one of the oldest and most respectable in the United States, will doubtless rejoice in the accession to their number of one who unites in his person so many useful qualities.

"Francis C. Treadwell, Counsellor at Law, and Lecturer upon the Constitution of the United States, will practise in the Courts of Maine, and the District and Circuit Courts of the United States, and may be consulted at his office, in Middle street, corner of Union street, Portland.

"Applications for the delivery of Lectures upon the Constitution, and upon subjects connected with the abuses of it: upon Judicial Legislation: Law and Lawyers: the protection of American Industry and American Liberty; if made by mail, must be post paid.

"☞ Mr. Treadwell will employ his leisure hours in writing a Manual or Brief Commentary upon the Constitution, exhibiting in its plain-dealing, its beauty and harmony: its abundant powers for good, and its lack of power for evil."

MASTERS IN CHANCERY. — The commissions of two masters in chancery, in Suffolk county, Joseph Willard and Edward G. Loring, Esquires, having expired, there was considerable speculation as to whom Governor Morton would appoint as their successors, the expectation being that he would select some gentlemen from his own political party. Bradford Sumner, Esq., has been appointed for one, and it is quite generally reported, that Ellis Gray Loring, Esq., has been nominated as the other. It is further said, that the latter nomination has not been confirmed by the council, and a doubt is expressed, whether it will be, for the alleged reason that the claims of Mr. Loring, who is a prominent abolitionist, are not so great as those of some others who are supposed to be desirous of the appointment. It is very certain, that Mr. Loring or either of the old incumbents would perform the duties of the office to the entire satisfaction of all persons interested, and it is to be hoped that an appointment will soon be made. Meanwhile, we have heard a doubt expressed, whether the masters whose commissions have expired, have any authority to go on with the cases in insolvency already commenced before them. Are such proceedings void *ab initio?*

Another question, which is somewhat discussed at present, is as to the effect of a discharge in insolvency upon debts contracted while the bankrupt act of the United States was in operation, and while the insolvent law of Massachusetts was *suspended* by the statute of March 3, 1842.

THE MARQUIS OF HERTFORD AND JOHN WILSON CROKER. — Certain proceedings in Chancery connected with the affairs of the late Marquis of Hertford, in which Mr. John Wilson Croker, editor of the *Quarterly Review*, Suisse, the Marquis's valet, and two or three females figure, have excited a good deal of attention. The late marquis's private habits were strikingly developed on the trial before lord Abinger, a few months back, when Suisse was arraigned and acquited on a charge of fraud. But the Chancery affidavits disclose an amount of profligacy on the part of the peer, even when on the verge of the grave, that was previously unknown, and that has rarely, if ever, been excelled in modern times. The "ladies," and more particularly one of them, yclept Flora Petit James, states that she was in the habit of "visiting" the marquis from December 1841, to his death in March 1842, and that he allowed her $100 a fortnight; but to another "lady," named Henrietta D'Ambre, he allowed £60, or $300 a fortnight! In fact, the marquis's harem cost, according to Suisse, somewhere about £30,000, which, multiplied by five, gives $130,000 per annum. One of his favorites, — a daughter of Flora Petit James, who had lived with the marquis since the age of sixteen, — states in her affidavit that *her* expenditure amounted to £7,000 or £8,000 a year! Mr. Croker has been blamed, with reason, for the part which he has played in these disreputable transactions. He certainly refused to ride out, or be seen in public with his patron's "ladies," but he was not above dining with them in private.